TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 213.

EDWARD A. THURSTON, SOLE SURVIVING TRUSTEE OF THE BANKRUPT ESTATE OF CHARLES PONZI, PETITIONER,

vs.

BENJAMIN BROWN, H. P. HOLBROOK, PATRICK W. HORAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1923.

CERTIORARI AND RETURN FILED APRIL 4, 1923.

(29,377)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1923.

No. 1563.

No. 1564.

No. 1565.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1921.

No. 1562.

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

BENJAMIN BROWN, Defendant, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 1263, Equity Docket.

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs,

v.

BENJAMIN BROWN, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the sixteenth day of July, A. D. 1921, and was duly entered at the June Term of this court, A. D. 1921, and is in the words and figures following.

In United States District Court

BILL OF COMPLAINT

[Filed July 16, 1921]

Between

JAMES A. LOWELL, of Newton, in the County of Middlesex; WILLIAM R. SEARS, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, All in the Commonwealth of Massachusetts, as They are Trustees of the Estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, Plaintiffs,

and

BENJAMIN BROWN, of Boston, County of Suffolk, and Commonwealth of Massachusetts, Defendant.

1. The plaintiffs are trustees of the estate of Charles Ponzi, bankrupt, by appointment of the United States District Court for the District of Massachusetts, on an involuntary petition in bankruptcy against said Ponzi filed in said court on August 9, 1920.

2. Prior to the date of the filing of said bankruptcy petition against him the said Ponzi was engaged under the name of the

"Securities Exchange Company" in the business of selling his own obligations, by the terms of which he promised to pay, ninety (90) days from date, the amount paid in plus fifty (50) per cent, in addition thereto.

3. The assets of the estate of said bankrupt are not sufficient to pay his debts in full.

4. On or about the twentieth day of July, 1920, the defendant paid the said Ponzi the sum of six hundred dollars ($600) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Company promised to pay the sum of nine hundred dollars ($900) ninety days after the date of the note.

On or about the twenty-fourth day of July, 1920, the defendant paid the said Ponzi the sum of six hundred dollars ($600) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Com-
3 pany promised to pay the sum of nine hundred dollars ($900) ninety days after the date of said note.

5. On or about the second day of August, 1920, and within four (4) months before the filing of said petition, the defendant presented said notes to the said Ponzi and requested that the sum of twelve hundred dollars ($1,200) be paid to him, and thereupon the said Ponzi caused to be transferred to said defendant said sum, which the defendant accepted in payment for said notes and delivered said notes to the said Ponzi.

6. At the time of said transfer of said twelve hundred dollars ($1,200) by the said Ponzi to the defendant the said Ponzi was insolvent, the said payment was a transfer of part of the property of the said Ponzi, the effect of which was to enable the defendant to obtain a greater percentage of his debt than other creditors of said Ponzi of the same class, and the defendant had reasonable cause to believe that said transfer would have such effect.

Wherefore the plaintiffs pray:

1. That said transfer of twelve hundred dollars ($1,200) may be declared to be a fraudulent preference and be ordered to be set aside.

2. That a decree may be entered requiring the defendant to pay back to the plaintiffs, trustees as aforesaid, the said amount of twelve hundred dollars ($1,200), with interest from the date of this bill of complaint to the date of payment.

3. For such other and further relief as justice and equity may require.

By their Attorneys, James A. Lowell, William R. Sears, and Edward A. Thurston, pro se; Hugh D. McLellan, C. H. Johnson.

At the same term, to wit, August 31, 1921, the following Answer was filed:

In United States District Court

ANSWER

[Filed August 31, 1921]

The answer of Benjamin Brown, defendant, a minor under the age of twenty-one years, by Annie Brown, his guardian ad litem, answers and says:

He was an infant under the age of twenty-one years at the time of the alleged transactions between himself and said Ponzi, his agents, or the Securities Exchange Company, and therefore submits his rights and interest in the matters in question in this cause to the protection of this Honorable Court.

And this defendant, not waiving his above plea, but on the contrary insisting thereon, for answer to this said bill of complaint says:

1. The defendant admits the allegation set forth in paragraph 1 of the bill of complaint.

2. The defendant neither admits nor denies the allegations contained in paragraph 2, but calls upon the plaintiffs to prove the same, if material.

3. The defendant neither admits nor denies the allegation contained in paragraph 3 of said bill of complaint, but calls upon the plaintiff to prove the same.

4. The defendant, answering to the allegations set forth in paragraph 4 of the bill of complaint, admits that on or about July 20, 1920, he has advanced to said Ponzi or his agents the sum of six hundred dollars (600) and received therefor a note, but this defendant neither admits nor denies any further allegations of said paragraph, but calls upon the plaintiffs to prove the same.

This defendant denies the allegations contained in the subdivision of paragraph 4 of said bill of complaint that the defendant paid a sum of six hundred dollars ($600), but says that a person named Eugene J. Gross of Boston used the name of this defendant for depositing in the name of said defendant the alleged sum with said Ponzi or his agents.

5. The defendant denies the allegations as alleged in paragraph 5 of the bill of complaint and further denies that he ever had a note for twelve hundred dollars ($1,200), but says that on or about the stated date, after having learned of the bankrupt fraud as is shown further in the answers of the defendant, demanded back the six hundred dollars ($600), and upon receipt of same returned the note to said Ponzi. Thereafter, this defendant was requested by said Eugene J. Gross to withdraw the six hundred dollars ($600) deposited by said Eugene J. Gross in the name of this defendant as is set forth in the previous paragraph. And this defendant, accommodating said Eugene J. Gross, received the six hundred dollars ($600) and returned the note to said Ponzi substantially in the same manner as in his own case.

6. This defendant denies the allegations set forth in paragraph 6 of the bill of complaint; and further answering the said bill of

complaint this defendant says that on various dates he was approached by the agents of said Ponzi, who urged this defendant to invest sums of money with said Ponzi in a business conducted by said Ponzi. The agent, for the purpose of inducing the defendant to invest, represented to him that said Ponzi was a man of great wealth and finance and a man of high character; that the said Ponzi was engaged in a business of international exchange, buying and selling foreign stamps and investing therein the moneys thus entrusted to him for the purpose of investment by his customers as aforesaid, that the business conducted by said Ponzi was entirely and in all respects legitimate and lawful and a business in which this defendant might properly invest his money. This defendant, believing such representations to be true and relying on the same, was induced to deposit with said Ponzi or his agents the sum as aforesaid for the purpose of investment in the foreign exchange; that subsequently this defendant was informed and believed that said representations were false and untrue, that the money entrusted to said Ponzi was not used for the purpose aforesaid, that the entire transaction was a trick and a fraud; therefore, this defendant demanded and received his money back.

And the defendant further says that said money was given to Ponzi or his agents under a mistake of fact, and that he was induced thereto by fraudulent and false representations of Ponzi and his agents, that said Ponzi never had title in or property to said sum, that he never invested the sums in his business and it never became part of said Ponzi's estate, assets, or property, that said sum was always the property of the defendant and as such was given to him back by said Ponzi.

And further answering to this bill of complaint this defendant says that he was never a creditor of said Ponzi and the said transactions dealing with said Ponzi do not come under the operation of the bankruptcy laws, as said sum never became part of the property of said Ponzi and the plaintiffs have no interest nor concern therein and no claim against this defendant in respect to this sum.

And further answering this bill of complaint and each of the paragraphs thereof, this defendant denies the same as fully and as specifically as though the same were traversed in detail except so far as the same have been hereunto expressly admitted.

Wherefore this defendant prays that the plaintiffs' bill of complaint may be dismissed and for his costs.

By his Attorney, Louis Goldberg.

This cause was then continued from term to term to the December Term, A. D. 1921, when this cause came on to be heard, and was fully heard by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, on the twenty-eighth day of February, A. D. 1922, and on the first, second and third days of March, A. D. 1922, together with the cases entitled No. 1182 Eq., Jas. A. Lowell et al., Trs., etc., v. H. W. Crockford; No. 1578 Eq., Same v. H. P. Holbrook,

No. 1580 Eq., Same v. Patrick W. Horan; No. 1163 Eq., Same v. Frank W. Murphy; and No. 1642 Eq., Same v. Thomas Powers.

On the seventeenth day of March, A. D. 1922, an opinion of the court was announced.

This cause was thence continued to the present March Term, A. D. 1922, when, to wit, April 21, 1922, the following Final Decree is entered accordingly:

In United States District Court

FINAL DECREE

[April 21, 1922.]

ANDERSON, *J.*: This cause came on to be heard after hearing upon the merits, and was argued by counsel. Thereupon, upon consideration thereof, and in accordance with the Memorandum of Opinion heretofore filed in this case, it is

Ordered, adjudged and decreed that in the above case the bill be dismissed with costs to the defendant.

By the Court, John E. Gilman, Jr., Deputy Clerk. April 21, 1922. G. W. A.

From the foregoing final decree the plaintiffs claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived, said appeal is allowed accordingly.

In United States District Court.

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt,

v.

BENJAMIN BROWN, No. 1263, Equity; H. W. CROCKFORD, No. 1182, Equity; H. P. Holbrook, No. 1578, Equity; Patrick W. Horan, No. 1580, Equity; Frank W. Murphy, No. 1166, Equity; Thomas Powers, No. 1642, Equity.

REQUESTS FOR RULINGS OF PLAINTIFFS

[Presented to the Court March 3, 1922]

The plaintiffs request the following rulings of law in each of the above cases:

1. On all the evidence in the case the plaintiffs as matter of law are entitled to recover.

2. On the facts shown in evidence in this case the average prudent man, standing in the position of this defendant, would have had reasonable cause to believe that Ponzi was insolvent at the time of the payment to the defendant.

8 3. On the facts shown in evidence in this case the average prudent man, standing in the position of this defendant, would have had reasonable cause to believe that a preference would be effected.

4. In order to make out the defense that the defendant rescinded a fraudulent transaction and got back the money which he gave to Charles Ponzi it is not sufficient to show that his money may have increased the general assets of Ponzi, but the defendant must trace his money into some specific fund on hand at the time he received his money, and that the money he received came out of this fund.

5. There is no evidence in this case that the money originally put in by the defendant was in any fund out of which the defendant was paid.

6. Money deposited in the Hanover Trust Company from investors or which was transferred to the Hanover Trust Company from other banks and represented money of investors, after the deposit of the defendant's money, if any, in said Trust Company, cannot be computed in determining the amount of the deposit at the time of the payment of the check given by Ponzi to the defendant.

7. The burden is on the defendant to show that the check which he received was drawn and paid from a deposit which as matter of law the defendant might have charged with a trust for the amount of such check.

By Their Attorneys, James A. Lowell, William R. Sears.

9 In United States District Court

OPINION OF THE COURT

[March 17, 1922]

JAMES A. LOWELL et al., Trustees,

v.

BENJAMIN BROWN, No. 1263, Equity; H. W. CROCKFORD, No. 1182, Equity; Patrick W. Horan, No. 1580, Equity; Frank W. Murphy, No. 1166, Equity; Thomas Powers, No. 1642, Equity; H. P. Holbrook, No. 1578, Equity.

I.

ANDERSON, *J.*: These six preference cases, brought by the Trustee in Bankruptcy of Charles Ponzi, were, by agreement, heard together. They are described by counsel as intended to test, in the Court of Appeals, questions common to many hundred suits now pending and yet to be filed. While they are brought on the equity side of the court, the defendants have not objected that the plaintiffs have a

Illinois Parlor Frame Co. v. Goldman, 257 Fed. 300.

full, adequate and complete remedy at law. I assume that such objection, if valid, may be waived.

Compare Warmath v. O'Daniel, 159 Fed. 87, and cases cited in note found in 16 L. R. A., n. s. 414. Milliken etc. Bank v. Spencer, 219 Fed., 503, and cases cited. Black on Bankruptcy, 3d Ed. sec. 401.

By these typical suits the plaintiff trustees seek to recover from the defendants, who paid money to Ponzi and thereafter demanded and received back the same sums, without interest or profit, the amounts thus paid and received, as unlawful preferences. The amounts involved and the date of payment and receipt may be tabulated as follows:

Name of defendant.	Amt. involved.	Date paid in 1920.	Date received back.
Benjamin Brown	$1,200	July 20 & 24th....	Aug. 2, 1920.
H. W. Crockford.....	1,000	July 24th	Aug. 2, 1920.
Patrick W. Horan.....	1,600	July 24th	Aug. 4, 1920.
Frank W. Murphy....	600	July 22d	Aug. 4, 1920.
Thomas Powers	500	July 24th	Aug. 3, 1920.
H. P. Holbrook.....	1,000	July 22d	Aug. 4, 1920.
	$5,900		

All the transactions fall within a period of about two weeks, between July 20th and August 4, 1920. All of the defendants received notes in the following typical form:

"The Securities Exchange Company for and in consideration of the sum of exactly $1,000, receipt of which is hereby acknowledged, agree to pay to the order of —— upon presentation of this voucher at ninety days from date, the sum of exactly $1,500 at the Company's office, 27 School Street, Room 227, or at any bank.

The Securities Exchange Company, per Charles Ponzi."

The Securities Exchange Company was nothing but Ponzi.

These notes were all given back to Ponzi when the defendants rescinded and received and cashed checks for like amounts as hereinafter set forth. Defendants plead in some legally sufficient form that they were all victims of Ponzi's fraud; that they elected to rescind, and did rescind; also that they had no reasonable cause to believe that the receipt of these moneys would effect preferences.

II.

In December, 1919, Ponzi began, in a small way, selling such 50 per cent 90-day notes, representing, in substance, that he had discovered that, through the use of international reply postal coupons or the manipulation of foreign exchange, or both, he was able to make, within a very short time, 100 per cent on all money entrusted to him, and was generously sharing this astounding profit with investors who should furnish him the money to

enable him to do the business on a large scale. If, at the outset, he had any capital at all of his own, it apparently did not exceed $150. For present purposes, it may be assumed that he started as a penniless swindler. His scheme was simply the old fraud of paying the earlier comers profits out of the contributions of the later comers. In some fashion he caused it to be generally understood that, although his notes were written on ninety days' time, he would redeem them in forty-five days. By the spring of 1920 this scheme had, apparently through advertising by word of mouth of recipients of the 50 per cent profit, spread like an infectious disease through the community. By July he was receiving contributions at the rate of about $1,000,000 a week. The aggregate in the period from some time in December, 1919, until the bankruptcy petition against him was filed on August 9, 1920, was between $9,000,000 and $10,000,000, received from perhaps 15,000 to 20,000 people. The scheme was, of course, a pure swindle. At no time did he deal substantially, probably not at all, in international coupons or in any other speculation in foreign exchange. On this record every note buyer or depositor was a victim of fraud. Counsel on both sides agree in the view that, as to all moneys so received, Ponzi was, when he received them, a trustee ex maleficio,—unless, of course, his investors stood on their rights under the notes, which, for present purposes, I assume they might legally do.

In the Horan case, No. 1580, is a plea of laches which may as well be disposed of before dealing with the vital points.

Ponzi was adjudicated a bankrupt on October 25, 1920. The suit against Horan was begun on October 24, 1921, although actual service was not made until some days later. The plea of
12 laches goes upon the theory that if Horan should be defeated he would have lost his right to prove his claim, because of the expiration of the year on October 25, 1921,—an inequitable result. The plea rests upon what appears to be a mistaken theory of the construction put upon Section 57 *n*. That section reads:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

The latter part of this provision, pertinently referred to by Judge Learned Hand as "the singularly blind language of the second sentence of section 57-*n*" (see In re John A. Baker Notion Company, 180 Fed. 922, 924), has been construed so as to leave the door open to parties, situated like these defendants, to prove their claims at the expiration of litigation adverse to them.

See

Re Bergdoll Motor Co., 233 Fed. 410;
Page v. Rogers, 211 U. S. 581;
Keppel v. Tiffin Savings Bank, 197 U. S. 356;
Hutchinson v. Otis, 115 Fed. 937, 942.

Other decisions are collected in
1 Remington Bankruptcy, 2d Ed. sec. 717, 727½;
Collier Bankruptcy, 10th Ed. sec. 746;
Black Bankruptcy, sec. 526.

This plea of laches cannot be sustained.

III.

While all the cases are, on the main issues, similar, the Brown case, No. 1263, is, in two material aspects, distinguishable: The defendant is an infant and defends by his guardian ad litem. It also appears that of the sum of $1,200 paid in by him on two days, July 20th and 24th, one-half, $600, was put in his name by another infant, Gross, a friend of Brown's without Brown's knowledge. Gross made the investment in Brown's name, fearing that his family would have the good sense to object if they learned of it. Brown collected the whole $1,200 under circumstances common to all of the cases, and turned over Gross' half, $600, to him. The plaintiffs nevertheless contend that Brown is liable for the whole $1,200.

No case is cited in which an infant has been held liable in a bankruptcy preference case. The plaintiffs cite and rely upon Christopher v. Norvell, 204 U. S. 216. In that case it was held that a married woman, residing in Florida, where common-law incapacities still obtained, could, under Revised Statutes, Section 5151, be held to pay an assessment on shares in a national bank, inherited by her. I think the case not in point. I rule that Brown is, on the ground of infancy alone, entitled to a decree. MacGreal v. Taylor, 167 U. S. 688; Tucker v. Moreland, 10 Pet. 58.

It also seems clear to me that, even if Brown is liable, he cannot be held for money which was invested by and paid back to Gross, the other infant. I so rule.

IV.

Turning now to the main issues: It is important to keep clearly in mind that these are suits to recover unlawful perferences, and nothing else. On no other ground has this court jurisdiction. See Section 60*b* of the Bankruptcy Act. They are not suits to set aside payments in fraud of creditors, or for settling conflicting equities among defrauded cestuis que trustent. They are technical preference suits. They might have been brought in a State court and tried before a jury. The issues here are precisely the same as they would have been in the State court on the law side. In order to recover, the plaintiffs must fully prove their cases under Section 60 of the Bankruptcy Act. The issues here presented are quite other than those before the court in the Bolignesi case, 254 Fed. 770, or in the Matthews case, 238 Fed. 785. See also In re Stewart, 178 Fed. 463.

As it was admitted that Ponzi was insolvent and that the payments

were made by him within four months, those elements of a voidable preference are made out. But the statute requires a payment or transfer "of his property," that is, the bankrupt's property, not the property that he might merely possess, but which was not distributable under the Bankruptcy Act to his creditors. 2 Collier Bankruptcy, 12th Ed., p. 885, and cases cited. "There can be no preferential transfer without a depletion of the bankruptcy estate." 2 Collier Bankruptcy, supra; 2 Black on Bankruptcy, 3d Ed., sec. 576; In re Schwab, 258 Fed. 772. No one contends that the return of goods secured by fraud constitutes a preference. Precisely so, in my view, as to the repayment of the defendants' money procured by fraud. Ponzi's estate in bankruptcy was not diminished by his returning to them money that belonged to them and not to him as a debtor and prospective bankrupt. They were not at that time, strictly speaking, creditors. They were victims of fraud, asserting, with Ponzi's assent, the right to rescind. 2 Black on Bankruptcy, 3d Ed., secs. 582, 583, 584. They did not stand on their notes, they gave them up, cancelled.

Of course these defendants, and all other victims, were
15 creditors of Ponzi in the sense that they had provable claims.
Crawford v. Burke, 195 U. S. 176; Tindle v. Burkett, 205 U. S. 183; Clark v. Rogers, 228 U. S. 534. So far as now appears, they could prove on the notes. And, apparently, since the amendment of 1903, 32 Stat. 798, they might prove claims for the amounts they paid without waiving the torts and being barred by a discharge. Talcott v. Friend, 228 U. S. 27; same case, 179 Fed. 676. An action for deceit affirms, it does not disaffirm, a fraudulently induced sale or loan.

Compare

Cheney v. Dickinson, 172 Fed. 109;
Frey v. Torrey, 75 N. Y. Supp. 40.

These cases hold that action for deceit may be brought even if the victim of the fraud has, by proof in bankruptcy, affirmed the transaction to the extent of allowing full title to the money or property to pass to the worker of the fraud. But clearly they could not prove a claim for money fraudulently obtained from them, and at the same time seek to recover from the bankrupt estate the same sum of money in specie. Rescission followed by an attempted recovery in specie, and a right to share in the distribution in bankruptcy, are plainly inconsistent remedies. Hewitt v. Hayes, 205 Mass. 356.

But our present concern is as to the title to the moneys paid Ponzi,—not as to rights for subsequent actions for deceit. These defendants neither waived the tort nor made any claim on the general assets, if there were then or thereafter any general assets. They claimed the right to rescind, gave up their notes, and took back the exact sums they paid in, so that their dealings with Ponzi neither increased nor diminished the amount of assets,—which remained for distribution exactly the same as if they had had no dealings at all with him.

Compare

In that case, the appellant had been fraudulently induced to raise the bankrupt's credit from $1,000 to about $6,000. On discovering the fraud, instead of rescinding the sale of the goods thus fraudulently procured, book accounts to the amount of about $4,000 were turned over to him. The decision below that this was a voidable preference was reversed by the Court of Appeals,—opinion by Circuit Judge Mack. The Court said:

"But on June 9th appellant concededly had a right to rescind the fraudulent sales and to recover back such of the goods as were then in the bankrupt's possession. Clearly a return of these goods would not be a preference; to the extent of their value, payment could no more effectuate a preference; neither transaction would diminish the estate to which bankrupt was then entitled. That appellant did not expressly assert a right of rescission is immaterial; it relinquished that right in confirming the sale; it then gave up a property interest equal to the value of the goods then on hand. To that extent the transfer was for a present consideration, and not preferential."

This case is in point. The defendants here, like the appellant in that case "concededly had a right to rescind" the transaction and get back their money. The plaintiffs concede that if they did "get back their money", that is, money that came out of a fund identified as one including their contributions, there was no preference. But even if Ponzi paid them out money derived from those who, by subsequently proving their claims, either on their notes or for the amounts paid in, waived the right to rescind, his estate was not diminished; for the defendants' money, thus freed from the trust ex maleficio, remained in his possession as an exact offset. They relinquished their right to a sum the exact equivalent of the sum they received. See the learned discussion of the law as to commingled and identified trust funds, by Judge Ray, in re Stewart, 178 Fed. 463, 470, 477. Compare Smith v. Mottley, 150 Fed. 266; Crawford County v. Strawn, 157 Fed. 49; Peters v. Bain, 133 U. S. 670, 693; Tiffany v. Boatmen's Institution, 18 Wall. 375.

Moreover, if the money with which Ponzi paid these defendants came technically out of a fund made up in whole or in part of money belonging to other cestuis who have not waived the torts, it is far from clear that such moneys ever became Ponzi's estate within the meaning of the Bankruptcy Act. Compare National Bank of Newport v. National Bank of Little Falls, 225 U. S. 178, 184, 185; New York County Bank v. Massey, 192 U. S. 138, 147. It is plain, however the legal elements are stated, that Ponzi's "estate", if he had any, was neither increased nor diminished by the short-lived fraudulently induced contributions and withdrawals of these defendants.

But plaintiffs contend "that the burden is upon the defendants to show that the checks they received were drawn on and paid from a deposit which, as matter of law, the defendants might have charged

with a trust for the amount of such checks". They cite for this proposition: In re Matthews, 238 Fed. 785; In re Bolognesi, 254 Fed. 770; In re Kearney, 167 Fed. 995.

Neither of these first two cases was a preference case. Both were petitions to revise orders of distribution of funds among special claimants,—in which the courts proceed under general equity principles, and not in accordance with the specific requirements of the preference statute. As I construe them, they have little or no bearing on the questions here presented,—which, as already stated, are questions of technical, statutory preferences.

This contention as to burden of proof cannot, in my view, be sustained. 2 Black on Bankruptcy, 3d Ed. sec. 614. The burden is upon the plaintiffs to show that the defendants have received unlawful preferences. Even if, as the plaintiffs contend, the money paid by Ponzi to these defendants came out of deposits held by Ponzi as trustee ex maleficio for other dupes, I do not believe the plaintiffs can on that ground maintain these preference suits. They must show that Ponzi's estate, that is, an estate distributable to Ponzi's creditors (not belonging in equity to cestuis), was diminished by the payments made to these defendants.

On all the evidence, I find and rule that the defendants were not, when paid, creditors within the meaning of Section 60 of the Bankruptcy Act; and also that Ponzi's estate was not diminished by these payments.

18 But even if the burden of proof is upon the defendants to show that their moneys came back out of a deposit charged with a trust in their behalf, I think that that burden has been sustained. It is undisputed, and I find, that the defendants' moneys were deposited, not later than one day after their payments to Ponzi, in the Hanover Trust Company, with other moneys extracted from other victims by similar frauds. I also find that all the moneys were repaid on the dates above set forth by checks drawn on Ponzi's account in the Hanover Trust Company. Three checks were certified, three were not.

These six checks were promptly cashed at the Hanover Trust Company. But in this connection, at the plaintiffs' request, I find, if material, that approximately 500 other checks were given by Ponzi for the sums originally contributed by the recipients thereof, for amounts not shown in the evidence, either seriatim or in the aggregate, and that such checks had not at the beginning of the bankruptcy proceedings been cashed, that claims in bankruptcy grounded on such checks were filed and allowed. It does not appear whether any of said unpaid checks were or were not ever presented to the Trust Company for payment. Counsel agree that the accounts, although carried in several names, were all Ponzi's accounts. The relation of the defendants' payments and receipts to this fund in the Hanover Trust Company will be more clearly shown by setting forth a consolidated statement, prepared by the plaintiffs' expert accountant, of these accounts from July 19 to August 11, 1920, inclusive:

Consolidation of All the Charles Ponzi Accounts.

	Less transfers.	Transfers.	Deposits, total.	Withdrawals.	Balance.
1920	334,726 69	.....	$334,726 69	.....	$334,726 69
July 19	193,296 79	.....	193,296 79	$101,500 —	426,523 48
20	273,713 18	.....	273,713 18	18,513 22	681,723 44
21	273,802 98	.....	273,802 98	1,869 24	953,657 18
22	285,847 66	.....	285,847 66	503,350 —	736,154 84
23	270,992 92	.....	270,992 92	73,117 34	954,630 42
24	100,000 —*	100,000 —	.....	62,284 94	871,745 48
26	528,458 76	55,850 70	584,309 46	572,098 77	883,956 17
27	563,541 79	.....	563,541 79	288,172 95	1,159,325 01
28	254,195 75	300,000 —	554,195 75	905,719 10	1,107,801 66
29	760,058 63	.....	760,058 63	508,235 16	1,059,625 13
30	.....	.....	.....	405,127 25	654,497 88
31	23,072 50	.....	23,072 50	168,514 35	509,056 63
Aug. 2	.....	.....	.....	387,619 52	121,436 51
3	40,600 —	400,000 —	440,600 —	541,870 84	20,165 67
4	359,080 —	299,600 —	658,680 —	295,172 47	313,737 08
5	256,360 58	25,000 —	281,360 58	524,585 04	140,448 74
6	259,999 38	283,709 62	543,709 —	249,999 32	434,158 42
7	68,768 34*	204,950 58	136,182 24	556,949 34	13,391 32
9	31,471 11	.....	31,471 11	376,740 50	331,878 07*
10	471,393 08	9,300 00	480,693 08	151,349 99	2,534 98*
11	9,300 —	.....	9,300 —	.....	6,765 02
	$5,021,143 46	$1,678,410 90	$6,699,554 36	$6,692,789 34	$6,765 02

*In red ink in original.

The items in the column headed "Transfers" refer to sums gathered by Ponzi into the Hanover Trust Company from other banks. The items in the first column are payments of victims like the defendants. All the moneys of these defendants were deposited in this Trust Company not earlier than July 20, or later than July 26, 1920. (July 25 was Sunday.)

Brown's, the earliest case, may be taken as typical. The plaintiffs contend that because the amount on deposit on July 20,—$681,723.44,—was, if all the intervening withdrawals were applied to that balance alone, fully withdrawn by July 26 at the latest, the payment on August 2 to the defendant Brown did not come out
20 of a fund which included his original contributions on July 20 and 24 of $1,200.

Undoubtedly, as already set forth, all the deposits made in the Hanover Trust Company were funds orginally belonging in equity to Ponzi's dupes; they all had a right to give up their notes and demand their moneys back, because obtained from them by fraud. But it is admitted that of the large sums (about $3,500,000) deposited between July 20 and August 5 a great part came from victims who subsequently filed claims in bankruptcy of about $4,000,000, thus electing to treat themselves as creditors ab initio rather than as cestuis qui trustent. Even if Ponzi stopped issuing new notes on July 26, as is claimed, approximately $2,500,000 of depositors' money was, in the period July 26—August 4, put into the Hanover Trust Company.

It follows that all moneys received and paid by such creditor victims must be regarded, for present purposes, as Ponzi's money, i. e., money loaned to him.

Compare

Crawford v. Burke, 195 U. S. 176;

Hewitt v. Hayes, 205 Mass. 356, 363, and cases cited on page 364,

where it is explicitly ruled that such depositors, by proving in bankruptcy, elect as their remedy to be creditors. So proving, they lost their right to rescind; their money was loaned to Ponzi.

The result is that the entire deposit in the Hanover Trust Company was of a mixed fund made up in part of the trustee's (Ponzi's) own funds and in other part of money belonging to the defendants and to other similar cestuis. It is well settled that when a wrongdoing trustee makes withdrawals from such a mixed fund, the presumption is that he first withdraws his own money, and not the trust money. Hewitt v. Hayes, 205 Mass. 356, 361, and cases cited; National Bank v. Insurance Co., 104 U. S. 54; Richardson v. Shaw, 209 U. S. 365; In re Hallett's Estate, 13 Ch. Div. 696; National City Bank v. Hotchkiss, 231 U. S. 50; Southern etc. Oil Co. v. Elliotte, 218 Fed. 567, 571; In re Stewart, 178 Fed. 463. Ponzi's drafts on this fund during this period were, therefore, of money loaned to him.—at least in large part.

21 It follows that on August 4, after the defendants had cashed all their checks, there still remained at least $20,165.67 of the

found on deposit on July 20 when Brown's money went into the trust fund; for this was the smallest balance on any day now material. If we take the next earliest transactions, Horan's and Holbrook's, on July 22, these sums were part of a balance of $736,154.84; and after their withdrawal on August 4 there was a balance of $313,-737.08. It is obvious that we need not resort to the theory of the restoration to an exhausted trust fund from moneys of the defaulting trustee, in order to meet the claim that the moneys of these defendants were not repaid from general assets of a bankruptcy estate.

On all the evidence I find that the defendants' money went, on or almost immediately after the dates of the payments, into an identified deposit in the Hanover Trust Company, and there remained until it was repaid to them by checks drawn as above set forth. In other words, so far as the defendants' rights are concerned, the trust fund in the Hanover Trust Company remained unaffected by the large deposits and withdrawals between July 20 and August 5.

Mention may be made of the fact that, in addition to the moneys appearing in this consolidated account in the Hanover Trust Company, Ponzi had actually there on deposit $1,500,000 more represented by time certificates of deposit taken out for the purpose of preventing embarrassment to the bank through which the Hanover Trust Company checks were cleared. While these certificates were negotiable, they were not in fact negotiated. They were grounded on moneys received prior to the earliest date here significant,—July 20.

Plaintiffs contend,—and on this point I think they are right,—that the existence of this additional fund of $1,500,000 has nothing to do with the issue here involved. There is no evidence that any part of that million and a half was derived from these defendants, or that any of their payments came out of it. But, if material, it is a fact that Ponzi had in this Trust Company during the period in question a deposit ranging from two and a half millions down to little over one and a half millions.

V.

But, if wrong in the conclusions so far stated, did the defendants have reasonable cause to believe that the payments to them would effect a preference? If and in so far as such "reasonable cause to believe" means simply that they had reasonable cause to believe that Ponzi was insolvent, I find that they did have such reasonable cause to believe. On the morning of August 2, 1920, there was published in the Boston Post a report, headlined in great letters, to the effect that Ponzi was insolvent. I am satisfied that all of the defendants either saw this report or heard enough of its contents so that they knew that one McMasters, who was or had been in Ponzi's employ, reported in substance that Ponzi was insolvent, and to the effect that he had been paying earlier comers out of the proceeds of later comers' contributions. Apart from this published statement, it is difficult for one accustomed to dealing with realities to believe that any ordinarily intelligent person could regard the scheme as other than one

that made its worker insolvent almost from the start. I think they had more than "reasonable cause to suspect insolvency."

Compare

Putnam v. United States Trust Co., 223 Mass. 199, 204;
Rogers v. Am. Halibut Co., 216 Mass. 227, 229.

But the statute requires more than reasonable cause to believe that Ponzi was insolvent. It requires reasonable cause to believe that such payments "would effect a preference," that is, that "the effect of the" payments "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." But they were not demanding and receiving money as creditors. They asked to have their money back and, so far as they knew or "had reasonable cause to believe," they got back their own money.

On all the evidence I find that the defendants had no reasonable cause to believe that the money received by them by payment of the checks drawn on the Hanover Trust Company did not
23 come from the specific fund into which their moneys had gone. I find this, even if, in fact, it did not come from such fund.

Again, I am unable to find that these defendants had reasonable cause to believe that they were getting a greater percentage of their claims (assuming for the moment that such claimants are creditors) than other claimants "of the same class." I do not believe the classification of creditors in Section 60 of the Bankruptcy Act has any application to the conflicting claims of claimants to share in a trust fund grounded wholly upon a scheme of fraud, or to the conflicting claims between the cestuis of such trust fund and creditors of the bankrupt who have stood on their rights under the notes, or by other conduct, have waived their right to rescind, so that their contributions have been, ab initio, transmuted into loans to the bankrupt. As a practical matter, the only claimants "in the same class" as these defendants would be other victims who have exercised or seek to exercise like rights to rescind. No such claimants are now before this court.

Compare 2 Collier Bankruptcy, 12th Ed. pp. 894, 895.

So far as I am aware, the classes of creditors referred to in the preference section are such creditors as those to whom taxes are owing, employees, and any others who by the laws of the States or of the United States are entitled to priority as distinguished from general unsecured creditors. 2 Collier Bankruptcy, supra, p. 895. Such classification obviously does not fit this case.

In a word, I am unable to believe that the preference section of the Bankruptcy Act is applicable to this case. I find nothing supporting the plaintiffs' main contentions in Clark v. Rogers, 228 U. S. 534, and Schuyler v. Litchfield, 232 U. S. 707. Compare Crawford v. Burke, 195 U. S. 176; Tindle v. Birkett, 205 U. S. 183; Talcott v. Friend, 228 U. S. 27.

In my view, no case cited, properly analyzed, supports the plaintiffs' contention. Both the issues and the record in this case are

radically different from those before Judge Morton in Lowell v. Ashton, 272 Fed. 536. There is nothing in that record indicating what Judge Morton's views would be on the questions with which I must deal. In effect, the plaintiffs seek a ruling that an insolvent swindler cannot assent to the rescission of any of his swindling transactions without thus making his temporary victims unlawfully preferred creditors,—assuming bankruptcy within four months and reasonable cause to believe him insolvent. I am constrained to reject that proposition.

The bills must each be dismissed with costs.

In United States District Court

Plaintiffs' Petition for Appeal

[Filed April 21, 1922]

The above-named plaintiffs, James A. Lowell, William R. Sears and Edward A. Thurston, trustees, conceiving themselves aggrieved by the decree made and entered on the twenty-first day of April, A. D. 1922, in the above-entitled cause, do hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit, for the reasons set forth in their assignment of errors, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit sitting at Boston, in the District of Massachusetts, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made and for such further orders and decrees as to the court may seem meet and proper and the circumstances of the case may require.

James A. Lowell et al., Trustees.

April 22, 1922. Allowed.

G. W. Anderson, Circ. Judge.

25 In United States District Court

ASSIGNMENT OF ERRORS

[Filed April 27, 1922]

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt,

v.

BENJAMIN BROWN, No. 1263, Equity; H. W. CROCKFORD, No. 1182, Equity; H. P. Holbrook, No. 1578, Equity; Patrick W. Horan, No. 1580, Equity; Frank W. Murphy, No. 1166, Equity; Thomas Powers, No. 1642, Equity.

Now come the plaintiffs in the above-entitled cases and file in each of the above cases the following assignment of errors, upon which they rely in the prosecution of their appeal in the above-entitled causes from the final decrees made by this Honorable Court on the twenty-first day of April, 1922:

1. On all the evidence in the case the court erred in entering the final decree of the twenty-first day of April, 1922.

2. On the facts found by the Court as set forth in the opinion dated March 17, 1922, the court erred in entering said final decree.

3. The court erred in finding that there was a completed rescission of the transaction involved in the purchase of a Ponzi note.

4. The court erred in ruling that there was a completed rescission of the transaction involved in the purchase of a Ponzi note.

5. The court erred in finding that there was a completed rescission of the transaction involved in the purchase of a Ponzi note valid against the plaintiffs as trustees in bankruptcy of Charles Ponzi under the provisions of Section 60 of the Bankruptcy Act.

6. The court erred in ruling that there was a completed rescission of the transaction involved in the purchase of a Ponzi note valid against the plaintiffs as trustees in bankruptcy of Charles Ponzi under the provisions of Section 60 of the Bankruptcy Act.

7. The court erred in finding that each defendant being paid by Ponzi was not a creditor within the meaning of Section 60 of the Bankruptcy Act.

26 8. The court erred in ruling that each defendant when being paid was not a creditor within the meaning of Section 60 of the Bankruptcy Act.

9. The court erred in finding that Ponzi's estate was not diminished by the payment to each defendant.

10. The court erred in ruling that Ponzi's estate was not diminished by the payment to each defendant.

11. The court erred in ruling that the burden is not upon the defendants to show that the checks which they received were drawn on and paid from a deposit which as matter of law defendants might have charged with a trust for the amount of each.

12. The court erred in ruling that investors with Ponzi who subsequently proved a claim for the amount of their investment, whose money composed in part Ponzi's deposit in the Hanover Trust Company at the time of the payment of money to the defendants, by so proving their claim elected to treat themselves as creditors ab initio.

13. On the facts in evidence in this case the court erred in ruling that investors—whose money constituted a part of Ponzi's deposit in the Hanover Trust Company from which the several defendants were paid—by subsequently proving claims in bankruptcy thereby converted nunc pro tunc such deposit into a mixed fund which to the extent of the moneys received from investors thereafter so proving claims belonged absolutely to the said Ponzi.

14. The court erred in ruling that the proof of claims in bankruptcy by investors whose moneys Ponzi had deposited in the Hanover Trust Company in any way enlarged the rights of any of the defendants.

15. On the evidence in this case the court erred in ruling and finding that the money of the defendants went into an identified deposit in the Hanover Trust Company and there remained until it was repaid to them by checks.

16. The court erred in ruling and finding that the "trust fund" in the Hanover Trust Company remained unaffected by the large deposit and withdrawals between July 20th and August 5th.

17. The court erred in ruling and finding that the money on deposit in the Hanover Trust Company was a trust fund for the defendants or any of them.

18. The court erred in finding that each defendant had reasonable cause to believe that he got back his own money.

19. On all the evidence in the case the court erred in finding that the several defendants did not have reasonable cause to believe that the payment in question to him would effect a preference.

20. The court erred in finding that the several defendants did not have reasonable cause to believe his respective payment would effect a preference, since it is inconsistent with other controlling facts found by the court.

21. The court erred in ruling that within the meaning of the Bankruptcy Act other creditors whose claims have been proved in bankruptcy are not creditors of the same class as are or were the defendants in this case.

22. The court erred in ruling that the preference section of the Bankruptcy Act is inapplicable to the several cases.

23. The court erred in failing to give the first ruling of law which the plaintiffs requested, as follows:

"1. On all the evidence in the case the plaintiffs as matter of law are entitled to recover."

24. The court ered in failing to give the third ruling of law which the plaintiffs requested, as follows:

"3. On the facts shown in evidence in this case the average prudent man, standing in the position of this defendant, would have had reasonable cause to believe that a preference would be effected."

25. The court erred in failing to give the fourth ruling of law which the plaintiffs requested, as follows:

"4. In order to make out the defense that the defendant rescinded a fraudulent transaction and got back the money which he gave to Charles Ponzi it is not sufficient to show that his money may have increased the general assets of Ponzi, but the defendant must trace his money into some specific fund on hand at the time he received his money, and that the money he received came out of this fund."

26. The court erred in failing to give the fifth ruling of law which the plaintiffs requested, as follows:

"5. There is no evidence in this case that the money originally put in by the defendant was in any fund out of which the defendant was paid."

27. The court erred in failing to give the sixth ruling of law which the plaintiffs requested, as follows:

"6. Money deposited in the Hanover Trust Company from investors or which was transferred to the Hanover Trust Company from other banks and represented money of investors' after the deposit of the defendant's money, if any, in said Trust Company, cannot be computed in determining the amount of the deposit at the time of the payment of the check given by Ponzi to the defendant."

28. The court erred in failing to give the seventh ruling of law which the plaintiffs requested, as follows:

"7. The burden is on the defendant to show that the check which he received was drawn and paid from a deposit which as matter of law the defendant might have charged with a trust for the amount of such check."

By their Attorneys, William R. Sears, James A. Lowell.

In United States District Court

WAIVER OF APPEAL BOND

[Filed April 25, 1922]

And now comes the defendant in the above-entitled cause and waives the filing of any appeal bond by the plaintiffs.

Louis Goldberg, Attorney for the Defendant.

In United States District Court

STIPULATION AS TO EXHIBITS

[Filed April 25, 1922]

It is hereby stipulated by and between the parties that all exhibits may be printed in the Transcript of Record to the Circuit Court of Appeals, excepting the daily newspapers; and that all reports from daily newspapers which were put in evidence as such during the trial of the foregoing cause may be referred to at the argument before the Circuit Court of Appeals and need not be printed in said Transcript of Record.

Stanley B. Hall, Attorney for Plaintiffs.
Louis Goldberg, Attorney for Defendant.

In United States District Court

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt,

v.

BENJAMIN BROWN, No. 1263, Equity; H. W. CROCKFORD, No. 1182, Equity; H. P. Holbrook, No. 1578, Equity; Patrick W. Horan, No. 1580, Equity; Frank W. Murphy, No. 1166, Equity; Thomas Powers, No. 1642, Equity.

PRÆCIPE

[Filed April 25, 1922]

You are requested to make transcripts of records all to be filed in one volume in the United States Court of Appeals for the First Circuit pursuant to appeals allowed in the above-entitled causes and to include in said transcripts of records the following, to wit:

1. Bill of complaint.
2. Answer.
3. Requests for rulings of plaintiffs.
4. Memorandum of decision.
5. Final decree.
6. Statement in narrative form of testimony.
7. Stipulation as to exhibits.
8. Copies of exhibits (excepting newspaper reports).
9. Petition for appeal.
10. Assignment of errors.
11. Waiver of appeal bond.
12. Præcipe.
13. Citation on appeal.
14. Certificate of clerk of District Court.

(Note as to above items 3-14 inclusive.)—All the above items, excepting the bill of complaint and answer, are identical in language for all the above-entitled causes and you are therefore requested to make items 3-14, inclusive, appear as an appendix in the volume including said transcripts of records and to refer in each transcript of record to said appendix for said items 3-14.

Respectfully,

Stanley B. Hall, Attorney for the Plaintiffs.

Service of the above præcipe is accepted and acknowledged. We have no objection to the above records being made up as aforesaid.

Louis Goldberg, Attorney for Defendant Benjamin Brown. John H. Devine, Attorney for Defendant H. W. Crockford. J. P. Dexter, Attorney for Defendant H. P. Holbrook. Michael J. Horan, Attorney for Defendant Patrick W. Horan. Edward A. Coulihan, Jr., Attorney for Defendant Frank W. Murphy. William H. Powers, Jr., Attorney for Defendant Thomas Powers.

31 In United States District Court

CITATION ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Benjamin Brown, of Boston, County of Suffolk, and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-ninth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein James A. Lowell, of Newton, in the County of Middlesex, William R. Sears, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, all in the Commonwealth of Massachusetts, as trustees of the estate of Charles Ponzi, bankrupt, of Lexington, in said County of Middlesex, are appellants and you are appellee, to show cause, if any there be, why the said decree entered against the said appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge duly assigned to hold the District Court of the United States for the District of Massachusetts, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

George W. Anderson, United States Circuit Judge.

Acknowledgement of Service of Citation on Appeal

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

April 29, 1922.

Due and sufficient service of the within citation is hereby accepted in behalf of Benjamin Brown.

Louis Goldberg, Attorney for Benjamin Brown.

In United States District Court

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing, together with the narrative form of the testimony and the exhibits printed at the end of this volume, are true copies of the papers indicated by the parties as being the portions of the record of said District Court to be included in the record on the appeal of the plaintiffs, in the cause in equity entitled, No. 1263, James A. Lowell et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs, v. Benjamin Brown, Defendant, together with the original Citation and Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighteenth day of May, A. D. 1922.

James S. Allen, Clerk. [Seal.]

33 United States Circuit Court of Appeals for the First Circuit, October Term, 1921

No. 1563

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

H. W. CROCKFORD, Defendant, Appellee

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 1182, Equity Docket

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs,

v.

H. W. CROCKFORD, Defendant

The bill of complaint in this cause was filed in the clerk's office on the fourteenth day of June, A. D. 1921, and was duly entered at the March Term of this court, A. D. 1921, and is in the words and figures following:

34 In United States District Court

Between

JAMES A. LOWELL, of Newton, in the County of Middlesex; WILLIAM R. SPEARS, of Cohasset, County of Norfolk, and EDWARD A. THURSTON, of Fall River, County of Bristol, All in the Commonwealth of Massachusetts, as They Are Trustees of the Estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, Plaintiffs,

and

H. W. CROCKFORD, of Winthrop, in the County of Suffolk, Defendant

BILL OF COMPLAINT

[Filed June 14, 1921]

1. The plaintiffs are trustees of the estate of Charles Ponzi, bankrupt, by appointment of the United States District Court for the District of Massachusetts, on an involuntary petition in bankruptcy against said Ponzi filed in said court on August 9, 1920.

2. Prior to the date of the filing of said bankruptcy petition against him the said Ponzi was engaged under the name of the "Securities Exchange Company" in the business of selling his own obligations,

by the terms of which he promised to pay, ninety (90) days from date, the amount paid in plus fifty (50) per cent in addition thereto.

3. The assets of the estate of said bankrupt are not sufficient to pay his debts in full.

4. On or about the twenty-fourth day of July, 1920, the defendant paid the said Ponzi the sum of one thousand dollars ($1,000) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Company promised to pay the sum of fifteen hundred dollars ($1,500) ninety (90) days after the date of the note.

5. On or about the second day of August, 1920, and within four (4) months before the filing of said petition, the defendant presented said note to the said Ponzi and requested that the sum of one thousand dollars ($1,000) be paid to him, and thereupon the said Ponzi caused to be transferred to said defendant said sum, which the defendant accepted in payment for said note and delivered said note to the said Ponzi.

6. At the time of said transfer of said one thousand dollars ($1,000) by the said Ponzi to the defendant the said Ponzi was insolvent, the said payment was a transfer of part of the property of the said Ponzi, the effect of which was to enable the defendant to obtain a greater percentage of his debt than other creditors of said Ponzi of the same class, and the defendant had reasonable cause to believe that said transfer would have such effect.

Wherefore the plaintiffs pray:

1. That said transfer of one thousand dollars ($1,000) may be declared to be a fraudulent preference and be ordered to be set aside.

2. That a decree may be entered requiring the defendant to pay back to the plaintiffs' trustees, as aforesaid, the said amount of one thousand dollars ($1,000), with interest from the date of this bill of complaint to the date of payment.

3. For such other and further relief as justice and equity may require.

By Their Attorneys, James A. Lowell, William R. Sears, and Edward A. Thurston, pro se: Hugh D. McLellan, Max E. Bernkopf, 611 Tremont Building, Boston.

This cause was thence continued to the June Term, A. D. 1921, when on the nineteenth day of July an answer was filed.

This cause was thence continued from term to term to the December Term, A. D. 1921, when, to wit, December 19, 1921, a motion to amend answer was filed and allowed, the Answer as amended being as follows:—

36 In United States District Court

ANSWER AS AMENDED

[Answer Filed July 19, 1921; Amended December 19, 1921]

Now comes the defendant in the above-entitled action and, without waiving his demurrer, makes answer to the plaintiffs' bill of complaint as follows:

1. The defendant admits the allegations in paragraph 1 of the plaintiffs' bill of complaint.

2. The defendant neither admits nor denies the allegations in paragraph 2 of the plaintiffs' bill of complaint, and calls upon the plaintiffs to prove same.

3. The defendant neither admits nor denies the allegations in paragraph 3 of the plaintiffs' bill of complaint and calls upon the plaintiffs to prove same.

4. The defendant admits the allegations in paragraph 4 of the plaintiffs' bill of complaint relative to the time that he paid to the said Ponzi the sum of $1,000 and for which he received the said Ponzi's note, but to the other allegation in said paragraph 4 of the plaintiffs' bill of complaint the defendant denies same and calls upon the plaintiffs to prove same.

5. The defendant neither admits nor denies the allegations in paragraph 5 of the plaintiffs' bill of complaint and calls upon the plaintiffs to prove same.

6. The defendant neither admits nor denies the allegations in paragraph 6 of the plaintiffs' bill of complaint as to the insolvency of the said Ponzi and therefore calls upon the plaintiffs to prove same. As to the other allegations contained in said paragraph 6 of the plaintiffs' bill of complaint the defendant denies same.

7. And further answering the defendant says that the money which he turned over to said Ponzi was procured from him by the said Ponzi by fraud and misrepresentation, and upon discovering said fraud and misrepresentation the defendant repudiated, cancelled and rescinded the contract entered into between himslf and the said Ponzi and demanded the return of said one thousand dollars ($1,000), and that at the time of said demand the defend-
37 ant had no knowledge whatsoever of the insolvent condition of the said Ponzi.

Wherefore the defendant prays that the bill be dismissed, and for his costs.

By His Attorney, John H. Devine.

This cause thereupon came on to be heard and was fully heard by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, on the twenty-eighth day of February, A. D. 1922, and on the first, second and third days of March, A. D. 1922, together with the cases entitled No. 1263 Equity, James A. Lowell et al., Trs., etc., v. Benjamin

Brown; No. 1578 Equity, Same v. H. P. Holbrook; No. 1580 Equity, Same v. Patrick W. Horan; No. 1166 Equity, Same v. Frank W. Murphy, and No. 1642 Equity, Same v. Thomas Powers.

On the seventeenth day of March, A. D. 1922, an opinion of the court was announced.

This cause was thence continued to the present March Term, A. D. 1922, when, to-wit, April 21, 1922, the following Final Decree is entered accordingly:—

In United States District Court

FINAL DECREE

[April 21, 1922]

[MEMORANDUM.—Copy of Final Decree is here omitted as it is identical in language with the one printed on page 7 of this volume. James S. Allen, Clerk.]

From the foregoing final decree the plaintiffs claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived said appeal is allowed accordingly.

In United States District Court

OPINION OF THE COURT

[March 17, 1922]

[MEMORANDUM.—The Opinion of the Court will be found printed on page 9 of this volume. James S. Allen, Clerk.]

In United States District Court

PLAINTIFFS' PETITION FOR APPEAL

[Filed April 21, 1922]

ASSIGNMENT OF ERRORS

[Filed April 27, 1922]

WAIVER OF APPEAL BOND

[Filed April 25, 1922]

STIPULATION AS TO EXHIBITS

[Filed April 29, 1922]

[MEMORANDUM.—The Petition for Appeal, Assignment of Errors, Waiver of Appeal Bond and Stipulation are here omitted as they are identical in language with the ones printed on pages 24–29 of this volume. James S. Allen, Clerk.]

In United States District Court

CITATION ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. W. Crockford, of Winthrop, in the County of Suffolk and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-ninth day of May next pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein James A. Lowell, of Newton, in the County of Middlesex, William R. Sears, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, all in the Commonwealth of Massachusetts, as Trustees of the estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, are appellants and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit
39 & 40 Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

George W. Anderson, United States Circuit Judge.

Acknowledgment of Service of Citation on Appeal

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

April 28, 1922.

Service of within citation is hereby accepted on behalf of H. W. Crockford.

Devine, York & Ellsworth, John H. Devine, Attorneys for Defendant.

In United States District Court

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing, together with the narrative form of the testimony and the exhibits printed at

the end of this volume, are true copies of the papers indicated by the parties as being the portions of the record of said District Court to be included in the record on the appeal of the plaintiffs, in the cause in equity entitled, No. 1182, James A. Lowell et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs, v. H. W. Crockford, Defendant, together with the original Citation and the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighteenth day of May, A. D. 1922.

James S. Allen, Clerk. [Seal.]

41 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921

No. 1564

James A. Lowell et al., Trustees, Plaintiffs, Appellants,

v.

H. P. Holbrook, Defendant, Appellee.

Transcript of Record of District Court

No. 1578, Equity Docket

James A. Lowell et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs,

v.

H. P. Holbrook, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the twenty-fourth day of October, A. D. 1921, and was duly entered at the September Term of this court, A. D. 1921, and is in the words and figures following:

42 In United States District Court

BILL OF COMPLAINT

[Filed October 24, 1921]

Between

JAMES A. LOWELL, of Newton, in the County of Middlesex; WILLIAM R. SEARS, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, All in the Commonwealth of Massachusetts, as They are Trustees of the Estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, Plaintiffs,

and

H. P. HOLBROOK, of Holliston, in the County of Middlesex, Commonwealth of Massachusetts, Defendant

1. The plaintiffs are trustees of the estate of Charles Ponzi, bankrupt, by appointment of the United States District Court for the District of Massachusetts, on an involuntary petition in bankruptcy against said Ponzi filed in said court on August 9, 1920.

2. Prior to the date of the filing of said bankruptcy petition against him the said Ponzi was engaged under the name of the "Securities Exchange Company" in the business of selling his own obligations, by the terms of which he promised to pay, ninety (90) days from date, the amount paid in plus fifty (50) per cent in addition thereto.

3. The assets of the estate of said bankrupt are not sufficient to pay his debts in full.

4. On or about the twenty-second day of July, 1920, the defendant paid the said Ponzi the sum of one thousand dollars ($1,000) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Company promised to pay the sum of fifteen hundred dollars ($1,500) ninety (90) days after the date of the note.

5. On or about the fourth day of August, 1920, and within four (4) months before the filing of said petition, the defendant presented said note to the said Ponzi and requested that the sum of one thousand dollars ($1,000) be paid to him, and thereupon the said

43 Ponzi caused to be transferred to said defendant said sum, which the defendant accepted in payment for said note and delivered said note to the said Ponzi.

6. At the time of said transfer of said one thousand dollars ($1,000) by the said Ponzi to the defendant the said Ponzi was insolvent, the said payment was a transfer of part of the property of the said Ponzi, the effect of which was to enable the defendant to obtain a greater percentage of his debt than other creditors of said Ponzi of the same class, and the defendant had reasonable cause to believe that said transfer would have such effect.

Wherefore the plaintiffs pray:

1. That said transfer of one thousand dollars ($1,000) may be declared to be a fraudulent preference and be ordered to be set aside.
2. That a decree may be entered requiring the defendant to pay back to the plaintiffs, trustees as aforesaid, the said amount of one thousand dollars ($1,000), with interest from the date of this bill of complaint to the date of payment.
3. For such other and further relief as justice and equity may require.

By Their Attorneys, James A. Lowell, William R. Sears, and Edward A. Thurston, pro se; Hugh D. McLellan, Edward C. Mack, Jr., Charles C. Gammons.

In United States District Court

At the same term, to wit, November 28, 1921, the following Answer was filed:

ANSWER

[Filed November 28, 1921]

And now comes the defendant in the above-entitled case and makes answer to the plaintiffs' bill of complaint as follows:

1st. That he is without knowledge of the allegations in the first paragraph of the bill of complaint and leaves the plaintiffs to prove the same.

2d. That he is without knowledge of the allegations in the second paragraph of the bill of complaint and leaves the plaintiffs to prove the same.

3d. That he is without knowledge of the allegations in the third paragraph of the plaintiffs' bill of complaint and leaves the plaintiffs to prove the same.

4th. As to the allegations in the fourth paragraph of the bill of complaint the defendant says he is without knowledge as to said allegations. And further answering he says he has no knowledge as to whether the said Ponzi and the said Securities Exchange Company are the same person, nor as to whether the said note of the said Securities Exchange Company is the note of the said Charles Ponzi or not.

5th. The defendant denies the allegations contained in the fifth paragraph of the plaintiffs' bill of complaint.

6th. The defendant denies the allegations contained in the sixth paragraph of the bill of complaint.

7th. Further answering the defendant says that the bill is defective in that it does not show that the plaintiffs are duly qualified trustees of the estate of the said Charles Ponzi.

Further answering the defendant says that if the said Charles Ponzi and the Securities Exchange Company are the same person,

then the said Charles Ponzi or Securities Exchange Company was insolvent on or about July 22, 1920, and August 4, 1920, when according to the allegations contained in the bill of complaint the defendant paid to the Securities Exchange Company the sum of one thousand dollars, and that the said Charles Ponzi or the Securities Exchange Company knew when it received said money that he or it was insolvent.

Further answering the defendant says that if the said Charles Ponzi and the Securities Exchange Company are the same person, then said Ponzi represented to the defendant prior to said alleged payment of one thousand dollars by him to the Securities Exchange Company that the company was engaged in a lawful and legitimate business, to wit, the purchase and sale of a certain commodity known as the International Stamps; that the money paid to the company would be used in the business and that the said business was enormously profitable, so that the said company was able to earn a profit largely in excess of the amount to be paid to the defendant within ninety days after the date of the deposit.

That the defendant in reliance upon such representations and by reason thereof and in good faith deposited the sum of one thousand dollars with the Securities Exchange Company and received in return its note.

That the said representations were untrue and known at the time by the said Charles Ponzi to be untrue; that as a result of such untrue and fraudulent representations by the said Charles Ponzi no title passed for the money so obtained to either Charles Ponzi or the Securities Exchange Company.

Wherefore, the defendant prays that the bill of complaint be dismissed and for his costs.

H. P. Holbrook, By His Attorney, J. P. Dexter.

This cause was thence continued to the December Term, A. D. 1921, when this cause came on to be heard and was fully heard by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, on the twenty-eighth day of February, A. D. 1922, and on the first, second and third days of March, A. D. 1922, together with the cases entitled No. 1263 Eq., Jas. A. Lowell et al., Trs., etc. v. Benj. Brown; No. 1182 Eq., Same v. H. W. Crockford; No. 1580 Eq., Same v. Patrick W. Horan; No. 1166, Eq., Same v. Frank W. Murphy; and No. 1642 Eq., Same v. Thomas Powers.

On the seventeenth day of March, A. D. 1922, an opinion of the court was announced.

This cause was thence continued to the present March Term, A. D. 1922, when, to wit, April 21, 1922, the following Final Decree is entered accordingly:

46 In United States District Court

FINAL DECREE

[April 21, 1922]

[MEMORANDUM.—Copy of Final Decree is here omitted, as it is identical in language with the one printed on page 7 of this volume. James S. Allen, Clerk.]

From the foregoing final decree the plaintiffs claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived, said appeal is allowed accordingly.

OPINION OF THE COURT

[March 17, 1922]

[MEMORANDUM.—The Opinion of the Court will be found printed on page 9 of this volume. James S. Allen, Clerk.]

PLAINTIFFS' PETITION FOR APPEAL

[Filed April 21, 1922]

ASSIGNMENT OF ERRORS

[Filed April 25, 1922]

WAIVER OF APPEAL BOND

[Filed April 22, 1922]

STIPULATION AS TO EXHIBITS

[Filed April 22, 1922]

[MEMORANDUM.—The Petition for Appeal, Assignment of Errors, Waiver of Appeal Bond and Stipulation are here omitted as they are identical in language with the ones printed on pages 24-29 of this volume. James S. Allen, Clerk.

47 In United States District Court

CITATION ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. P. Holbrook, of Holliston, in the County of Middlesex, Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the

city of Boston, Massachusetts, on the twenty-ninth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein James A. Lowell, of Newton, in the County of Middlesex, William R. Sears, of Cohasset, in the Court of Norfolk, and Edward A. Thurston, of Fall River, in the County of Bristol, all in the Commonwealth of Massachusetts, as Trustees of the estate of Charles Ponzi, Bankrupt, of Lexington, in the said County of Middlesex, are appellants and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

George W. Anderson, United States Circuit Judge.

Acknowledgment of Service of Citation on Appeal.

April 28, 1922.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Service of within citation is hereby accepted on behalf of H. P. Holbrook.

J. P. Dexter, Attorney for Defendant.

48 In United States District Court.

CLERK'S CERTIFCATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing, together with the narrative form of the testimony and the exhibits printed at the end of this volume, are true copies of the papers indicated by the parties as being the portions of the record of said District Court to be included in the record on the appeal of the plaintiffs, in the cause in equity entitled, No. 1578, James A. Lowell et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs, v. H. P. Holbrook, Defendant, together with the original Citation and the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighteenth day of May, A. D. 1922.

James S. Allen, Clerk. [Seal.]

49 United States Circuit Court of Appeals for the First Circuit, October Term, 1921

No. 1565

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

PATRICK W. HORAN, Defendant, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 1580, Equity Docket

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Palintiffs,

v.

PATRICK W. HOPAN, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the twenty-fourth day of October, A. D. 1921, and was duly entered at the September Term of this court, A. D. 1921, and is in the words and figures following:

50 In United States District Court

BILL OF COMPLAINT

[Filed October 24, 1921]

Between

JAMES A. LOWELL, of Newton, in the County of Middlesex; WILLIAM R. Sears, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, All in the Commonwealth of Massachusetts, as They are Trustees of the Estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, Plaintiffs,

and

PATRICK W. HORAN, of Boston, in the County of Suffolk, Commonwealth of Massachusetts, Defendant.

1. The plaintiffs are trustees of the estate of Charles Ponzi, bankrupt, by appointment of the United States District Court for the District of Massachusetts, on an involuntary petition in bankruptcy against said Ponzi filed in said court on August 9, 1920.

2. Prior to the date of the filing of said bankruptcy petition against him the said Ponzi was engaged under the name of the

"Securities Exchange Company" in the business of selling his own obligations, by the terms of which he promised to pay, ninety (90) days from date, the amount paid in plus fifty (50) per cent in addition thereto.

3. The assets of the estate of said bankrupt are not sufficient to pay his debts in full.

4. On or about the twenty-fourth day of June, 1920, the defendant paid the said Ponzi the sum of sixteen hundred dollars ($1,600) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Company promised to pay the sum of twenty-four hundred dollars ($2,400), ninety (90) days after the date of the note.

5. On or about the fourth day of August, 1920, and within four (4) months before the filing of said petition, the defendant presented said note to the said Ponzi and requested that the sum of sixteen hundred dollars ($1,600) be paid to him, and there-
51 upon the said Ponzi caused to be transferred to said defendant said sum, which the defendant accepted in payment for said note and delivered said note to the said Ponzi.

6. At the time of said transfer of said sixteen hundred dollars ($1,600) by the said Ponzi to the defendant the said Ponzi was insolvent, the said payment was a transfer of part of the property of the said Ponzi, the effect of which was to enable the defendant to obtain a greater percentage of his debt than the other creditors of said Ponzi, of the same class, and the defendant had reasonable cause to believe that said transfer would have such effect.

Wherefore the plaintiffs pray:

1. That said transfer of sixteen hundred dollars ($1,600) may be declared to be a fraudulent preference and be ordered to be set aside.

2. That a decree may be entered requiring the defendant to pay back to the plaintiffs, trustees as aforesaid, the said amount of sixteen hundred dollars ($1,600), with interest from the date of this bill of complaint to the date of payment.

3. For such other and further relief as justice and equity may require.

By Their Attorneys, James A. Lowell, William R. Sears and Edward A. Thurston, pro se; Hugh D. McLellan, Edward C. Mack, Jr., Charles C. Garumons.

At the same term, to wit, November 23, 1921, an answer was filed.

This cause was thence continued to the December Term, A. D. 1921, when, on the first day of March, A. D. 1922, an amendment to answer was filed and allowed, the Answer as Amended being as follows:

32 In United States District Court

ANSWER AS AMENDED

[Answer Filed November 23, 1921; Amended March 1, 1922]

Now comes the defendant in the above-entitled case and for answer denies that he owes the plaintiff anything.

And further answering the defendant says that if it shall appear that he paid the amount alleged to the said bankrupt, then the same was secured from said defendant by fraud and misrepresentations of facts, and the repayment to him of said amount was in the nature of a restitution, and did not constitute a preference in law or in fact.

And further answering the defendant says that in all essential particulars the facts in this case are similar to those involved in certain other cases recently decided by this court adversely to the petitioners named herein, and that, applying the rules laid down in those prior cases, the defendant is entitled to a decree dismissing this petition.

And further answering the defendant says that Charles Ponzi was adjudicated a bankrupt on October 25, A. D. 1920, and the plaintiffs were appointed as trustees of his estate; that creditors of said estate were allowed one year after said date within which to prove their claims; that said period of one year has now expired, and if the petition of the plaintiffs is now allowed, the defendant cannot prove a claim against said bankrupt estate; that the effect of a decision in favor of the petitioners would be to leave the defendant without redress and without legal right to participate in the distribution of the bankrupt's assets; that such a result would be contrary to equity and good conscience and to the law in such case made and provided.

And further answering the defendant says that the petitioners have been guilty of laches in filing this petition, the effect of the allowance of which would be to leave the defendant without redress and a wronged party, and it is immaterial as a matter of law whether this laches was due to oversight or design.

Patrick W. Horan, By His Attorney, John P. Leahy.

33 Thereupon this cause came on to be heard and was fully heard by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, on the twenty-eighth day of February, A. D. 1922, and on the first, second and third days of March, A. D. 1922, together with the cases entitled No. 1263 Eq., Jas. A. Lowell et al., Trs., etc., v. Benj. Brown; No. 1182 Eq., Same v. H. W. Crockford; No. 1578 Eq., Same v. H. P. Holbrook; No. 1166 Eq., Same v. Frank W. Murphy; and No. 1642 Eq., Same v. Thomas Powers.

On the seventeenth day of March, A. D. 1922, an opinion of the court was announced.

This cause was thence continued to the present March Term, A. D. 1922, when, to wit, April 21, 1922, the following Final Decree is enetered accordingly:—

In United States District Court

FINAL DECREE

[April 21, 1922]

[MEMORANDUM.—Copy of Final Decree is hereby omitted, as it is identical in language with the one printed on page 7 of this volume, James S. Allen, Clerk.]

From the foregoing final decree, the plaintiffs claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived, said appeal is allowed accordingly.

In United States District Court

OPINION OF THE COURT

[March 17, 1922]

[MEMORANDUM.—The Opinion of the Court will be found printed on page 9 of this volume. James S. Allen, Clerk.]

PLAINTIFFS' PETITION FOR APPEAL

[Filed April 21, 1922]

ASSIGNMENT OF ERRORS

[Filed April 27, 1922]

54 In United States District Court

WAIVER OF APPEAL BOND

[Filed April 28, 1922]

STIPULATION AS TO EXHIBITS

[Filed April 28, 1922]

[MEMORANDUM.—The Petition for Appeal, Assignment of Errors, Waiver of Appeal Bond and Stipulation are here omitted, as they are identical in language with the ones printed on pages 24-29 of this volume. James S. Allen, Clerk.]

In United States District Court

CITATION ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Patrick W. Horan, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-ninth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein James A. Lowell of Newton, in the County of Middlesex, William R. Sears of Cohasset, in the County of Norfolk, and Edward A. Thurston of Fall River, in the County of Bristol, all in the Commonwealth of Massachusetts, as Trustees of the estate of Charles Ponzi, bankrupt, of Lexington, in the County of Middlesex, are appellants and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Anderson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

George W. Anderson, United States Circuit Judge.

55 & 56 *Acknowledgment of Service of Citation on Appeal*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

May 2, 1922.

Service of within citation is hereby accepted on behalf of Patrick W. Horan.

Michael J. Horan, Attorney for Defendant.

In United States District Court

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing, together with the narrative form of the testimony and the exhibits printed at the end of this volume, are true copies of the papers indicated by

the parties as being the portions of the record of said District Court to be included in the record on the appeal of the plaintiffs, in the cause in equity entitled, No. 1580, James A. Lowell et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs, v. Patrick W. Horan, Defendant, together with the original Citation and the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighteenth day of May, A. D. 1922.

James S. Allen, Clerk. [Seal.]

57 United States Circuit Court of Appeals for the First Circuit, October Term, 1921

No. 1566

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

FRANK W. MURPHY, Defendant, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 1166, Equity Docket

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs,

v.

FRANK W. MURPHY, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the fourteenth day of June, A. D. 1921, and was duly entered at the March Term of this court, A. D. 1921, and is in the words and figures following:

58 In United States District Court

BILL OF COMPLAINT

[Filed June 14, 1921]

Between

JAMES A. LOWELL, of Newton in the County of Middlesex; WILLIAM R. SEARS, of Cohasset, County of Norfolk, and EDWARD A. THURSTON, of Fall River, County of Bristol, All in the Commonwealth of Massachusetts, as They are Trustees of the Estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, Plaintiffs,

and

FRANK W. MURPHY, of Belmont, Middlesex County, said Commonwealth, Defendant.

1. The plaintiffs are trustees of the estate of Charles Ponzi, bankrupt, by appointment of the United States District Court for the District of Massachusetts, on an involuntary petition in bankruptcy against said Ponzi filed in said court on August 9, 1920.

2. Prior to the date of the filing of said bankruptcy petition against him the said Ponzi was engaged under the name of the "Securities Exchange Company" in the business of selling his own obligations, by the terms of which he promised to pay, ninety (90) days from date, the amount paid in plus fifty (50) per cent in addition thereto.

3. The assets of the estate of said bankrupt are not sufficient to pay his debts in full.

4. On or about the twenty-second day of July, 1920, the defendant paid the said Ponzi the sum of six hundred dollars ($600) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Company promised to pay the sum of nine hundred dollars ($900) ninety (90) days after the date of the note.

5. On or about the fourth day of August, 1920, and within four (4) months before the filing of said petition, the defendant presented said note to the said Ponzi and requested that the sum of six hundred dollars ($600) be paid to him, and thereupon the said Ponzi caused to be transferred to said defendant said sum, which
59 the defendant accepted in payment for said note and delivered said note to the said Ponzi.

6. At the time of said transfer of said six hundred dollars ($600) by the said Ponzi to the defendant the said Ponzi was insolvent, the said payment was a transfer of part of the property of the said Ponzi, the effect of which was to enable the defendant to obtain a greater percentage of his debt than other creditors of said Ponzi of the same class, and the defendant had reasonable cause to believe that said transfer would have such effect.

Wherefore the plaintiffs pray:

1. That said transfer of said six hundred dollars ($600) may be declared to be a fraudulent preference and be ordered to be set aside.

2. That a decree may be entered requiring the defendant to pay back to the plaintiffs, trustees as aforesaid, the said amount of six hundred dollars ($600), with interest from the date of this bill of complaint to the date of payment.

3. For such other and further relief as justice and equity may require.

By their Attorneys, James A. Lowell, William R. Sears, Edward A. Thurston, pro se; Hugh D. McLellan, Luther Hill, 54 Devonshire Street, Boston.

This cause was thence continued to the June Term, A. D. 1921, when, to wit, July 13, 1921, the following Answer was filed:

In United States District Court

ANSWER

[Filed July 13, 1921]

1. This defendant admits the allegations in paragraph one of the plaintiffs' bill of complaint.

2. This defendant for answer to the allegations contained in paragraph two of said bill of complaint so far as material to the
60 issues therein, neither admits nor denies, and calls upon the plaintiffs to prove the same.

3. This defendant neither admits nor denies the allegation contained in the third paragraph of said bill of complaint and calls upon the plaintiffs to prove the same.

4. This defendant in answer to the allegations in paragraph four of said bill of complaint admits that on or about the twenty-second day of July, 1920, he paid to the said Ponzi, or his agent, the sum of six hundred dollars ($600.00), and that he received from said agent a note, but this defendant neither admits nor denies the other allegations in said paragraph four contained, and calls upon the plaintiffs to prove the same so far as they may be material to the issues herein.

5. This defendant in answer to the allegations contained in paragraph five of said bill of complaint, denies the same as therein set forth, but admits that on or about the fourth day of August, 1920, he demanded of the said Ponzi the return of said six hundred dollars ($600.00) and thereupon the said Ponzi returned to this defendant said six hundred dollars and this defendant delivered said note to Ponzi.

6. This defendant in answer to the allegations contained in paragraph six of said bill of complaint neither admits nor denies that

at the time of said return of the said six hundred dollars by the said Ponzi to the defendant the said Ponzi was insolvent, and calls upon the plaintiffs to prove the same, and as to the other and further allegations contained in said paragraph six, this defendant denies the same.

And further answering the said bill of complaint, this defendant says that on or about the twenty-second day of July, 1920, he was approached by an alleged agent of the said Ponzi, who urged and solicited him to invest the sum of six hundred dollars in the business conducted by the said Ponzi; that said agent, for the purpose of inducing this defendant to invest said sum with said Ponzi, represented to him that said Ponzi was engaged in the business of dealing in foreign exchange, buying and selling the same, and investing therein the money entrusted to him for the purpose of such investment by his customers or clients; that said agent further represented to this defendant that said Ponzi was a man of high character and great wealth, and that his said business resulted in great profit to those entrusting their money to him for investment as aforesaid, and that said business was entirely and in all respects legitimate and lawful and a business in which this defendant might properly invest his money; that this defendant believing said representations to be true and relying upon the same, gave to said agent six hundred dollars for the purpose of investment as aforesaid; that immediately thereafter this defendant was informed and believed that the said representations of said agent in regard to said Ponzi and the said business conducted by him were false and that the said Ponzi did not deal in or buy or sell or invest money in foreign exchange; thereupon this defendant demanded and received back from the said Ponzi the said six hundred dollars as aforesaid.

This defendant further says that said six hundred dollars was given by him to the said agent of said Ponzi under a mistake of fact and that he was induced thereto by fraudulent and false representations of the said Ponzi and his said agent; that the said Ponzi never had property in or title to said six hundred dollars; that he never invested the same on account of this defendant in foreign exchange or otherwise, and never used said six hundred dollars in any way in his said business, and that the said six hundred dollars never became a part of the said Ponzi property, assets or estate; that said six hundred dollars was always the property of this defendant, and as such was given back to him by the said Ponzi as aforesaid.

And further answering said bill of complaint, this defendant says that he was never a creditor of said Ponzi and that his said transactions and dealings with the said Ponzi do not come under the operation and intent of the laws relating to bankruptcy, inasmuch as the said six hundred dollars never became a part of the property or estate of the said Ponzi, and that the said plaintiffs can have no interest or concern therein and no claim against this defendant in respect thereto.

And further answering the said bill of complaint and each of the paragraphs thereof, this defendant denies the same as fully and specifically as though the same were traversed in detail

except in so far as the same have been hereinbefore expressly admitted.

Wherefore this defendant prays that the plaintiffs' bill of complaint be dismissed and for his costs.

By His Attorney,

Edward A. Counihan, Jr.

This cause was thence continued from term to term to the December Term, A. D. 1921, when this cause came on to be heard and was fully heard by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, on the 28th day of February, A. D. 1922, and on the 1st, 2d and 3d days of March, A. D. 1922, together with the cases entitled No. 1263 Eq., Jas. A. Lowell et al., Trs., etc., v. Benj. Brown; No. 1182 Eq., Same v. H. W. Crockford; No. 1578 Eq., Same v. H. P. Holbrook; No. 1580 Eq., Same v. Patrick W. Horan; and No. 1642 Eq., Same v. Thomas Powers.

On the seventeenth day of March, A. D. 1922, an opinion of the court was announced.

This cause was thence continued to the present March Term, A. D. 1922, when, to wit, April 21, 1922, the following Final Decree is entered accordingly:

In United States District Court

FINAL DECREE

[April 21, 1922]

[MEMORANDUM.—Copy of Final Decree is here omitted, as it is identical in language with the one printed on page 7 of this Transcript of Record. James S. Allen, Clerk.]

From the foregoing final decree the plaintiffs claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived, said appeal is allowed accordingly.

63 In United States District Court

OPINION OF THE COURT

[March 17, 1922]

[MEMORANDUM.—The Opinion of the Court will be found printed on page 9 of this volume. James S. Allen, Clerk.]

PLAINTIFFS' PETITION FOR APPEAL

[Filed April 21, 1922]

ASSIGNMENT OF ERRORS

[Filed April 27, 1922]

WAIVER OF APPEAL BOND

[Filed April 22, 1922]

STIPULATION AS TO EXHIBITS

[Filed April 27, 1922]

[MEMORANDUM.—The Petition for Appeal, Assignment of Errors, Waiver of Appeal Bond and Stipulation are here omitted as they are identical in language with the ones printed on pages 24-29 of this volume. James S. Allen, Clerk.]

In United States District Court

CITATION ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frank W. Murphy, of Belmont, in the County of Middlesex and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-ninth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein James A. Lowell, of Newton, in the County of Middlesex, William R. Sears, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, all in the Commonwealth of Massachusetts, as Trustees of the estate of Charles Ponzi, bankrupt, of Lexington, in said County of Middlesex, are
64 appellants and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

George W. Anderson, United States Circuit Judge.

Acknowledgment of Service of Citation on Appeal

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

April 28, 1922.

Service of within citation is hereby accepted on behalf of Frank W. Murphy.

Edward A. Counihan, Jr., Attorney for Defendant.

In United States District Court

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing, together with the narrative form of testimony and the exhibits printed at the end of this volume, are true copies of the papers indicated by the parties as being the portions of the record of said District Court to be included in the record on the appeal of the plaintiffs, in the cause in equity entitled, No. 1166, James A. Lowell et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs, v.
65 & 66 Frank W. Murphy, Defendant, together with the original Citation and the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighteenth day of May, A. D. 1922. James S. Allen, Clerk. [SEAL.]

67 United States Circuit Court of Appeals for the First Circuit.
October Term, 1921

No. 1567

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

THOMAS POWERS, Defendant, Appellee

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 1642, Equity Docket

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs,

v.

THOMAS POWERS, Defendant.

The bill of complaint in this cause was filed in the clerk's office on the twenty-first day of November, A. D. 1921, and was duly

entered at the September Term of this court, A. D. 1921, and is in the words and figures following:—

In United States District Court

BILL OF COMPLAINT

[Filed November 21, 1921]

Between

JAMES A. LOWELL, of Newton, in the County of Middlesex, WILLIAM R. Sears, of Cohasset, County of Norfolk, and Edward A. Thurston, of Fall River, County of Bristol, All in the Commonwealth of Massachusetts, as They are Trustees of the Estate of Charles Ponzi, Bankrupt, of Lexington, in said County of Middlesex, Plaintiffs,

and

THOMAS POWERS, of the City of Boston and County of Suffolk, Defendant.

1. The plaintiffs are trustees of the estate of Charles Ponzi, bankrupt, by appointment of the United States District Court for the District of Massachusetts, on an involuntary petition in bankruptcy against said Ponzi filed in said court on August 9, 1920.

2. Prior to the date of the filing of said bankruptcy petition against him the said Ponzi was engaged under the name of the "Securities Exchange Company" in the business of selling his own obligations, by the terms of which he promised to pay, ninety (90) days from date, the amount paid in plus fifty (50) per cent in addition thereto.

3. The assets of the estate of said bankrupt are not sufficient to pay his debts in full.

4. On or about the twenty-fourth day of July, 1920, the defendant paid the said Ponzi the sum of five hundred dollars ($500) for which he got a note of the said Ponzi under the name of the Securities Exchange Company, by which the Securities Exchange Company promised to pay the sum of seven hundred fifty dollars ($750) ninety (90) days after the date of the note.

5. On or about the third day of August, 1920, and within four (4) months before the filing of said petition, the defendant presented said note to the said Ponzi and requested that the sum of five hundred dollars ($500) be paid to him, and thereupon the said Ponzi caused to be transferred to said defendant said sum, which the defendant accepted in payment for said note and delivered said note to the said Ponzi.

6. At the time of said transfer of said five hundred dollars ($500) by the said Ponzi to the defendant the said Ponzi was insolvent, the said payment was a transfer of part of the property of the said Ponzi, the effect of which was to enable the defendant to obtain a

greater percentage of his debt than other creditors of said Ponzi of the same class, and the defendant had reasonable cause to believe that said transfer would have such effect.

Wherefore the plaintiffs pray:

1. That said transfer of five hundred dollars ($500) may be declared to be a fraudulent preference and be ordered to be set aside.
2. That a decree may be entered requiring the defendant to pay back to the plaintiffs, trustees as aforesaid, the said amount of five hundred dollars ($500), with interest from the date of this bill of complaint to the date of payment.
3. For such other and further relief as justice and equity may require.

By their Attorneys, James A. Lowell, William R. Sears, and Edward A. Thurston, pro se; Hugh D. McLellan, Jones & Allen.

This cause was thence continued to the December Term, A. D. 1921, when on the twenty-third day of December, 1921, an answer was filed.

At the same term, to wit, March 2, 1922, an amendment to answer was filed and allowed, the Answer as Amended being as follows:

In United States District Court

ANSWER AS AMENDED

[Answer Filed December 23, 1921; Amended March 2, 1922]

Now comes the defendant and makes answer to the bill of complaint as follows:

70 1. He admits the averments in paragraph one.

2. As to paragraph two, the defendant denies specifically the allegations contained therein and calls upon the plaintiff to prove the same.

3. As to paragraph three, the defendant knows nothing of the allegations contained therein and neither admits nor denies the same, and calls upon the plaintiff to prove the same.

4. As to paragraph four, the defendant denies specifically the allegations contained therein and calls upon the plaintiff to prove the same.

5. As to paragraph five, the defendant denies specifically the allegations contained therein and calls upon the plaintiff to prove the same.

6. As to paragraph six, the defendant denies specifically the allegations contained therein and calls upon the plaintiff to prove the same.

And further answering, the defendant says that should the plaintiff prove that there was a transfer of five hundred (500) dollars made

by said Ponzi to him, the same was not fraudulent, was not a preference and that the same should not be set aside.

And further answering the defendant says that if the plaintiff shall prove that the defendant received five hundred (500) dollars from Charles Ponzi, the same was his property and that he was rightfully entitled to receive said sum.

And further answering the defendant says that if the plaintiff shall prove that the defendant deposited a sum of money with Charles Ponzi, said sum is not and never became the property of said Ponzi, but always remained the property of the defendant and therefore did not become a part of the assets of said Ponzi.

And further answering the defendant says that if the plaintiff shall prove that the defendant deposited a sum of money with Charles Ponzi, he was induced so to do through fraud and misrepresentations on the part of said Ponzi, and said sum is not and never became the property of said Ponzi; that because of said fraud and misrepresentations he was rightfully entitled to rescind and withdraw his deposit at any time. The repayment to him of said amount was a restitution and did not constitute a preference in law or in fact.

Wherefore the defendant prays that the plaintiff's bill of complaint be dismissed and that he may recover judgment for his costs and all other proper relief.

Thomas Powers, By Barton & Harding, His Attorneys.

Thereupon this cause came on to be heard and was fully heard by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, on the twenty-eighth day of February, A. D. 1922, and on the first, second and third days of March, A. D. 1922, together with the cases entitled No. 1263 Equity, Jas. A. Lowell et al., Trs., etc., v. Benj. Brown; No. 1578 Equity, Same v. H. P. Holbrook; No. 1580 Equity, Same v. Patrick W. Moran; and No. 1166 Equity, Same v. Frank W. Murphy.

On the seventeenth day of March, A. D. 1922, an opinion of the court was announced.

This cause was thence continued to the present March Term, A. D. 1922, when to wit, April 21, 1922, the following Final Decree is entered accordingly:

In United States District Court

FINAL DECREE

[April 21, 1922]

[MEMORANDUM.—The Final Decree is here omitted as it is identical in language with the one printed on page 7 of this volume. James S. Allen, Clerk.]

From the foregoing final decree, the plaintiffs claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and bond having been waived, said appeal is allowed accordingly.

72 In United States District Court

OPINION OF THE COURT

[March 17, 1922]

[MEMORANDUM.—The Opinion of the Court will be found printed on page 9 of this volume. James S. Allen, Clerk.]

PLAINTIFF'S PETITION FOR APPEAL

[Filed April 21, 1922]

ASSIGNMENT OF ERRORS

[Filed April 27, 1922]

WAIVER OF APPEAL BOND

[Filed April 22, 1922]

STIPULATION AS TO EXHIBITS

[Filed April 22, 1922]

[MEMORANDUM.—The Petition for Appeal, Assignment of Errors, Waiver of Appeal Bond, and Stipulation are here omitted as they are identical in language with the ones printed on pages 24-29 of this volume. James S. Allen, Clerk.]

In United States District Court

CITATION ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas Powers, of Boston, County of Suffolk, Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-ninth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein James A. Lowell, of Newton, in the County of Middlesex, William R. Sears, of Cohasset, in the County of Norfolk, and Edward A. Thurston, of Fall River, in the County of Bristol, all in the Commonwealth of Massachusetts, as trustees of the estate of
73 Charles Ponzi, bankrupt, of Lexington, in the County of Middlesex, are appellants and you are appellee, to show cause, if

ay there be, why the said decree, entered against the said appellants, should no be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge, duly signed to hold the District Court of the United States for the District of Massachusetts, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

George W. Anderson, United States Circuit Judge.

Acknowledgment of Service of Citation on Appeal

April 28, 1922.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Service of within citation is hereby accepted on behalf of Thomas Powers.

William H. Powers, Jr., Attorney for Defendant.

In United States District Court

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing, together with the narrative form of the testimony and the exhibits printed at the end of this volume, are true copies of the papers indicated by the parties as being the portions of the record of said District Court to be included in the record on the appeal of the Plaintiffs, in the case in equity entitled, No. 1642, James A. Lowell, et al., Trustees of the Estate of Charles Ponzi, Bankrupt, Plaintiffs, v. Thomas Powers, Defendant, together with the original Citation and the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District this eighteenth day of May, A. D. 1922.

James S. Allen, Clerk. [Seal.]

74 In United States District Court

STATEMENT OF TESTIMONY IN NARRATIVE FORM

[Filed April 21, 1922; Approved May 2, 1922]

JAMES A. LOWELL et al., Trustees of the Estate of Charles Ponzi, Bankrupt,

v.

BENJAMIN BROWN, No. 1263, Equity; H. W. CROCKFORD, No. 1182, Equity; H. P. Holbrook, No. 1578, Equity; Patrick W. Horan, No. 1580, Equity; Frank W. Murphy, No. 1166, Equity; Thomas Powers, No. 1642, Equity.

It was agreed that a creditors' petition in bankruptcy was filed against Charles Ponzi on the ninth day of August, 1920; that thereafter, to wit, on the twenty-fifth day of October, 1920, the said Ponzi was duly a-judicated a bankrupt on said petition by the United States District Court for the District of Massachusetts, and that the plaintiffs were thereafter duly elected trustees of his estate and duly qualified as such and thereafter continued to hold said office.

RALPH L. LONGDEN, called as a witness for the plaintiffs, testified in substance as follows:

That he was a public accountant, connected with the firm of Charles Rittenhouse & Company and had had a wide general experience in various accounting work; that he was employed in the early Fall of 1920 by the receivers of Charles Ponzi to make a study of Ponzi's financial books and records, in which work he was assisted by Mr. Ponzi; that these records consisted of note stubs, redeemed notes, check stubs, cancelled checks, bank statements, a card record of investments, correspondence files, agents' receipt stubs, cash sheets, payroll book, petty cash book and other related data; that from these records he learned that Ponzi's business was that of issuing notes under the name "Securities Exchange Company".

Most of these notes were payable on their face in ninety
75 days, but were almost invariably paid within forty-five days, and the amount promised was usually 50 per cent greater than the amount deposited; that a few notes for 40 per cent more than the amount deposited were issued in Ponzi's early business career; that these are unimportant; that there were four notes where the amount promised was 100 per cent more than the amount deposited; that he found no instances where the notes paid had run over forty-five days; that Ponzi was under a considerable amount of expense in conducting this business, the largest item of expense being commissions paid agents, in most cases 10 per cent; that apparently these commissions were paid promptly, and nearly all the business was conducted through agents; that the result was that practically every

receipt of every $100 involved an immediate expenditure to the agent as commission of at least 10 per cent, and each $100 that Ponzi took in would immediately be diminished by the payment of at least $10 to some agent; that the Lawrence agent was paid 15 per cent upon transactions of approximately $1,500,000.

That Ponzi's books and records showed no evidence of any business that he was engaged in other than the sale of his notes, or indication of the receipt of revenue or income of any kind other than by such sale; that he had other expenses in conducting his business of substantial amounts, and he made some loans and investments. As far as the records show, that he started in business in December, 1919, with a capital of $150; that at the date when he was petitioned into bankruptcy, August 9, 1920, Ponzi had outstanding, on the basis of investment value, notes amounting to $4,263,652.14; that by investment value he meant money invested; that according to the tenor of the notes at that date the amount outstanding would be $6,396,-253.23; that from the study of his records, in witness' opinion Ponzi was insolvent at all times from January 1, 1920, to August 9, 1920, and was more insolvent with each note that he sold.

That the total amount of notes issued during Ponzi's entire career was, investment value, $9,582,591.82, and on the basis of the amount promised to pay—$14,374,755.59; that in round numbers $9,500,000 was paid in during that period; that as some of the agents received notes for commissions, the amount of cash obtained from the public would be approximately $9,300,000; that about $650,000 was paid to the agents, so that approximately $8,-600,000 actually got to Ponzi; that the form of note issued by Ponzi in his transactions was similar to the note numbered 25,672, dated July 24, 1920, payable to the order of Benjamin Brown, Exhibit 1 (a copy of which is printed among the exhibits in the case.)

That Ponzi had various bank accounts in Boston and in localities where he had agents who were selling the notes, such as Lawrence, Woonsocket, Providence and a number of other places; that from the study of his accounts the witness is able to state that the source of the moneys deposited in these various banks was money received from investors in Ponzi's notes; that sometimes an account might be transferred from an outlying bank into one of Ponzi's Boston banks, usually—toward the end of Ponzi's business career—into the Hanover Trust Company; that the transfers so made were moneys coming from investors.

On cross-examination the witness stated that he had no figures which would give substantially Ponzi's financial status on July 24th in respect to money on hand and obligations outstanding; that he had such figures for August 9th; that he considered the result of Ponzi's financial career as a whole and arrived at the result as of the end of his career rather than any particular date; that the amount of notes increased progressively each month up to the end, and the amount paid out increased but not in the same proportion; that in his opinion Ponzi was insolvent July 24th; that he found no evidence of investment by Ponzi during the month of July in foreign exchange, or at any time; there were investments in other things; that

there was no evidence of investment in international postal coupons.

On redirect examination witness testified that his study involved the question of attempting to locate other assets than those which he receivers had discovered and filed in their inventory in court; that he was unable to discover any such assets of any substantial sum.

77 BENJAMIN BROWN, called by the plaintiffs, testified on direct examination that he was under twenty-one years of age. He was an accountant and had been practicing for two months. He had been employed by the Hanover Trust from June, 1919, to August, 1920, as manager of the savings department. On June 9, 1920, he invested $400, receiving a note for $600, with Ponzi, which note is not involved in the present suit. On July 20th or 24th he presented his note for payment, got a check for $600 and immediately reinvested it and got a note for $900, marked either "Exhibit 1" or "Exhibit 2." At this time he had no doubt of Ponzi's ability to pay the $600 with 50 per cent interest.

A friend of his, one Gross, had invested $600 of his own money with Ponzi, taking a note for $900 payable to Brown without telling the witness till afterward when he gave him the note. Brown did not know whether he invested his own $600 on the twentieth or the twenty-fourth day of July. On August 2, 1920, the witness went to Ponzi's office at 27 School Street, delivered both notes to the cashier, signing his name on the back of each, and got a check on the Hanover Trust Company for $1,200 and cashed it there on August 2d or 3d. The notes for $900 each were introduced in evidence and marked respectively "Exhibits 1" and "2," and the check for $1,200, "Exhibit 1*a*," was also introduced.

The witness did not recall that he had heard that Ponzi had stopped taking in money some time in July. He lived in Revere and came up to business on the narrow gauge road. He didn't ever notice whether the people on the train read newspapers. He got anxious about his money and made up his mind to take it out, because he was afraid if he left it in he wouldn't get his money. He didn't recall having heard people say that it was impossible for Ponzi to make any such profit as he claimed to make. He read the American fairly regularly. Practically every day at that time he was reading a newspaper. He knew that the Post and the American were discussing Ponzi's affairs.

On August 2d he stood in line at Ponzi's office for about two and one-half hours to get his check. He had been there before to invest
78 his money. He came to Boston on August 2d by train. He was also at Ponzi's office on Saturday, July 31st, but too late: the office was closed. He did not see the large headlines in the Boston Post of August 2d—"Ponzi is Now Hopelessly Insolvent"—as he came up in the train. Did not recall ever seeing it till he saw it in the court room. He was able in the court room to read this headline fifteen feet away. All parties having agreed that the Post was a newspaper circulating widely in Boston, this article was admitted in evidence subject to defendants' exception and

marked "Exhibit 3." He had not seen the article in the American of July 31st about Mr. Barron and Ponzi or the article headed "Italian Inquiry Fails"—or the article headed "Rush Auditing of Books." He knew that Ponzi's books were being examined by the United States Attorney, but didn't know for what purpose it was being done. By July 31st he had made up his mind to get out his money as quickly as he could, because he was afraid he was going to lose it. He did not recall that he had heard that there was a run on Ponzi. He didnt know when it started. It was going on the day he waited two and one-half hours for his check.

On cross-examination he testified as follows:

His salary in the savings department of the Hanover Trust Company was $1,200; there were two others in the department, but there was no boss. On August 2d he left home with the notes in his pocket about 8 a. m. to get the money out. He did not receive the Post in the morning at his home. He never carried either Exhibit 1 or Exhibit 2 around in his pocket before Saturday, July 31st. Gross told him he put the money in witness' name as he didn't want to have his folks know about it. He asked witness to take the money out for him. Witness gave $600 of the $1,200 check to Gross. Ponzi often came into the Hanover Trust Company where witness worked. Ponzi said he was doing a foreign exchange business and that it was perfectly safe. He said he made a whole lot more than 50 per cent, but he was giving the public some of the benefit. As a result the witness deposited his money. At this time the witness was eighteen years old. He had made up his mind on Saturday—79 August 2d was a Monday—to take his money out, and went up, but it was too late. Witness was worried; he had seen accounts in the paper about his dealings in Canada, his criminal record in Canada, and lots of things convinced him that his money would be safer in his own hands than in Ponzi's. He began to think that Ponzi was crooked. He saw that his bank balance was generally pretty large and he decided that if he was dealing in any foreign exchange business he couldn't very well afford to have his money in the bank at 2 per cent and pay 50 per cent and so he began to worry. He didn't think he was honest; he wouldn't trust him. He did not decide on Monday, August 2d, while riding on the train, to take the money out. It was on his mind Saturday and Sunday. At the time he left his house on Monday with the notes in his pocket he didn't think of Ponzi's financial standing. He took his money out because he thought Ponzi was a crook.

On redirect examination he testified as follows:

By Mr. Sears:

"Q. 1. Well, now, you say that it was owing to what you read in the paper about Ponzi's being a crook that you were led to take your money out?

A. I didn't hear that, Mr. Sears.

Q. 2. Do you say that it was what you read in the paper about

Ponzi's being a crook, and having a criminal record, that led you to take your money out?

A. I say I read about him, about his criminal records up in Canada.

Q. 3. Yes.

A. That tempted me somewhat.

Q. 4. I see. You read in the paper that Ponzi had had a criminal record in Canada and had served time?

A. Well, yes, I read it; yes.

Q. 5. You read that?

A. Yes.

Q. 6. And that was one of the things that induced you to try to get the amount of money that you had paid in?

A. I tell you that is the way I recall it. I recall seeing that, and I think that that was one of the things that tempted me. Now, as to whether I saw that before I took it out or afterwards I don't know.

Q. 7. You didn't modify it in that way when you first testified?

A. Well, that is the way that I recall it. Of course I say the things as I recall them.

80 Q. 8. Well, now, as a matter of fact, don t you know that there was nothing about Ponzi's having a criminal record that appeared in any newspaper until the 10th of August?

A. No, sir; I don't know it.

Q. 9. Well, now, if that is so, that was a week or more after you had got your check for $1,200?

A. Yes. Well, I don't recall it. I recall seeing it, but I don't recall at what time.

Q. 10. Well, if it was after that, it had nothing whatever to do with your trying to get back the amount that you had paid in, did it?

A. Evidently not.

Q. 11. Evidently not. And now you are totally uncertain as to when you saw that?

A. I don't know when I saw it; no, sir.

Q. 12. But you do know that you saw it?

A. Yes, sir.

Q. 13. You have no doubt of it?

A. No doubt.

Q. 14. As a matter of fact, is it not true that when you saw that you congratulated yourself on having gotten the check and cashed the check for $1,200?

A. I don't recall that either."

HENRY P. HOLBROOK, called as a witness by the plaintiffs, testified in substance as follows:

In July and August, 1920, he was working as a mechanic in a garage. In July he invested $1,000 with Ponzi, making payment to Ponzi's agent in Framingham, one Mazzola. For two or three weeks before this he had been hearing about Ponzi and had seen things in the newspapers about him, but hadn't paid much attention to them. He had seen the large profits that investors had made.

He paid the Ponzi Framingham agent by check payable to him for $1,000, dated July 22, 1920, which was offered in evidence and marked "Plaintiffs' Exhibit 4." The note of the Securities Exchange Company offered and marked as "Exhibit 5" is payable to him and his signature appears on the back of the note. At this time he took the Boston Post in the morning regularly. He must have seen the article in the Post of August 2d about Ponzi. He did not recall seeing in the paper that Ponzi had been ordered not to take in any more money. His signature appears on the check of the Securities Exchange Company dated August 4, 1920, payable to his order. Witness cashed the check at the bank. When he got the check, which was at Ponzi's office, he walked immediately over to the Hanover Trust Company, cashed it and deposited the cash in the Framingham Trust Company in his account. This was after the article in the Post of the 2nd of August. Witness did not think he saw the article in the Post of July 27th entitled: "Ponzi Closes—Not Likely to Resume." At the time he got the money everybody was talking "School Street," and he had heard that there was a crowd of people waiting in line. Witness went to the cashier's office and they gave him the check. The plaintiffs here offered article from the Boston Post of July 27, 1920, entitled: "Ponzi Closes—Not Likely to Resume," which was admitted and marked "Exhibit 6." He saw the Post of August 2d when it came out. Before he got his check for $1,000 he heard people saying Ponzi was not solvent.

On cross-examination witness testified substantially as follows: He made up his mind to withdraw the $1,000 he deposited after July 31st. He did this on account of buying a Studebaker automobile. The price was $2,035. He made his first payment of $400 for it July 31st. He withdrew his money from Ponzi to pay the balance of $400, the rest being paid by the trading in of a Buick car he had.

Before going down to draw out the money he had heard that Ponzi was insolvent. When he received his check he surrendered a receipt showing they had received his money. He had at no time had in his possession a so-called Ponzi note. His only explanation of why he drew that money is that he wanted to pay for the automobile. When he received his $1,000 back he did not have the note Exhibit 5—merely the receipt. The cashier had the note there and passed it out to witness to sign, which he did and passed the note back, and they gave him the $1,000. He never had the note in his possession except to sign it. The receipt witness had stated it was a temporary one which entitled the holder to a note or voucher. At Ponzi's office witness asked for $1,000, in no form of words for any profit. It was his purpose, when he went there to get back the $1,000, to give up the agreement that he had for any larger sum.

The agent told him when he invested the money that he would get the 50 per cent on his money in 90 days; that Ponzi was all right and that his money was a good investment put in there. Witness did not recall that agent stated how Ponzi was making money, but he heard he was making through foreign exchange.

He believed this when he put in his $1,000, and believed it when he got it back.

On redirect examination witness testified in substance that all that he heard about Ponzi's financial condition was that he was insolvent. The agent told him he could draw his money any time he wanted to, and he heard that great numbers of people were doing so. The reason he drew out his money was to buy this Studebaker car, for which he paid $800 plus the $1,235 which was allowed for the Buick car. After making the first payment on the car he had around $401 in the bank. He expected to get the $500 profit on his note at the end of 45 or 90 days, and felt no uncertainty about it notwithstanding reports of Ponzi's insolvency and the article in the Post. He made the second payment on the car on August 13th, and got $1,000 from Ponzi on August 4th.

He still felt he could get $1,500 by waiting if he left it there. He didn't look at it as if he were paying $2,535 for the car. He made an agreement to buy the car and would rather lose the $500 than owe on it. He was so anxious to get the car he was ready to throw away the extra $500. Witness had formerly been the proprietor of the Holliston Garage. He has the American left at his house at night. He did not remember the statement in the American of July 30th reading as follows:

"District Attorney Gallagher made this significant statement:
'It is manifestly unfair, in case Ponzi should be shown to be bankrupt, to have people who have put money into the Ponzi concern as an investment, obtain their money in advance of the other creditors, because it places them in the position of preferred creditors.
83 It is not up to me at this time to make any order, and certainly not to give Mr. Ponzi advice. He has his own attorneys.'"

The plaintiffs then introduced in evidence the Boston American of Saturday, July 30, 1920, marked "Exhibit 7"; check of the Holliston Garage, by H. P. Holbrook, to the order of Harry Bell, on the Framingham National Bank, dated July 30, 1920, "Exhibit 8"; check of the Securities Exchange Company dated August 4, 1920, to the order of H. P. Holbrook for $1,000, "Exhibit 9"; statement of account of the Holliston Garage with the Framingham National Bank for the months of July and August, 1920, "Exhibit 10." All of the defendants duly excepted to the introduction of Exhibit 7, the Boston American of July 30, 1920.

HAROLD W. CROCKFORD, called by the plaintiffs, testified in substance as follows:

He had no business at the present time. In July, 1920, he was a florist in Winthrop on his own account, with a branch store in Winchester. In July, 1920, he made an investment with Charles Ponzi of $1,000, receiving in return a note of the Securities Exchange Company dated July 24, 1920, which was admitted in evidence and marked "Exhibit 11." In the latter part of July and the early part

f August he read the Boston papers most every morning and saw tatements in almost every paper regarding Ponzi and his affairs. He did not recall seeing that Ponzi had been stopped from taking in ny more money. He received a check of the Securities Exchange ompany dated August 2, 1920, for $1,000.

On August 1, 1920, he gave the note, Exhibit 11, to his sister, liss Crockford, to take it to the home of one Terrile, an employee f Ponzi, to collect it for him and get him $1,000, the amount which e had previously paid for the note. He received the check on ugust 2d at Terrile's home, where he called for it. Check of the ecurities Exchange Company dated August 2, 1920, for $1,000 was ntroduced in evidence and marked "Exhibit 12." The signature n the back is the witness' signature, and name "Winifred Crockford" on the check is his sister's name. The check was certi-4 fied when he received it. He gave it to his sister to deposit.

Before he received the check of August 2 he had read the tatement in the Post of July 30, or one similar to it, entitled: "Cou-on Plan is Exploded. New York Postmaster Says Not Enough in Whole World to Make Fortune Ponzi Claims." The following article as read from the Post and received in evidence and marked "Exhibit 13," but being reproduced here is not copied among the exhibits:

"Postmaster Patten of the New York Postoffice today declared the ntire world's supply of international postal coupons is not large nough to enable any person to accumulate the fortune which harles Ponzi, the Boston financier, is said to have made through upon transactions and foreign exchange.

"In order to make eight million dollars, the sum which Ponzi is redited with having realized from his operations, one hundred sixty illion coupons would have been required according to Postmaster atten.

"To have made his money in these coupons would have been im-ossible, said Mr. Patten, for the reason that enough have not been rinted to permit it. There are not enough coupons in the world. ere in New York we keep not more than twenty-seven thousand on and, the demand for them is so small.

"The records of the New York Postoffice, Mr. Patten explains, ow that only $370.50 was paid to redeem coupons during the three onths ending July 30, and only $360 worth of coupons were sold ere during that period." * * *

Witness knew of the report that Ponzi had been taking in mil-ons. He saw the copy of the Post of August 2, 1920, with the rticle "Ponzi is Now Hopelessly Insolvent" before he received the heck Exhibit 12.

On cross-examination witness testified substantially as follows: He paid the $1,000 originally to Terrile at School Street. He knew Terrile personally. When this money was paid witness mentioned to Terrile that he thought it was a good investment. Terrile said it was a pretty sure thing. He had

heard that Ponzi was dabbling in international postal coupons and foreign stamps of some kind and was making approximately 100 per cent profit and paying 50 per cent of that to his customers. These statements he had heard from time to time for some time previous to the time he actually invested. He heard an agent say that the method had something to do with the difference in exchange by cashing them in different countries; that Ponzi had run across something that was pretty good, which other men had never found out before.

After making the investment he continued to look at the papers, and saw conflicting statements as to whether or not Ponzi's scheme was genuine. Witness came to the conclusion that there was doubt as to whether Ponzi was doing the business he thought. In other words he thought it was a fraud, and then determined to have his money refunded and sent his note up to Terrile. He gave no instructions to his sister as to what to say to him. He knew his sister went to Terrile's house on August 1st. On August 2d, when Terrile gave him the check Exhibit 12, he said to witness he thought it was perfectly good, that he hadn't seen anything out of the way. After August 2d he saw a statement in the Post, alleged to have been made by Mr. Ponzi, asserting his solvency and denying the statements of his insolvency in the article of August 2d.

To the time of the Post's publication August 2d (Exhibit 3) witness heard statements by various persons to the effect that Ponzi was making money in his business in foreign exchange and international reply coupons. It was just before August 1st that witness made up his mind that everyting was not as represented and that he wanted to get his money back and therefore sent the note to Terrile with the demand that he get witness' money.

On redirect examination witness testified substantially as follows:

He made the original payment to Ponzi by certified check on the Winthrop Trust Company dated July 24, 1920, the original of which was offered in evidence and marked "Exhibit 14".

86 Counsel for defendant Crockford here stated that he stood on his exception to the admission in evidence of the Post of August 2d, but waived exceptions to all previous papers.

PATRICK W. HORAN, called by the plaintiffs, testified in substance as follows: He was a newspaper mailer employed by the Boston Herald. July 24, 1920, he invested $1,600 in cash with Ponzi and received a note of the Securities Exchange Company of that date which was offered in evidence and marked "Exhibit 15". August 4th he took the note to the School Street office, waited in line twelve or fifteen minutes, signed his name on the back of the note, received a check for $1,600 on the Hanover Trust Company, took the check to the Trust Company and had it certified. His signatures are on the back of the check, which was admitted in evidence and marked "Exhibit 16". Witness testified he made the investment in consequence of an article he read in the Post which stated in large lines:

"Doubles the Money within Three Months

) Per Cent Interest Paid in 45 Days by Ponzi—Has Thousands of Investors. Deals in International Coupons Taking Advantage of Low Rates of Exchange."

nderstood the notes were being anticipated and paid in 45 days. le expected to get $2,400 for his investment of $1,600. Remembers he article in the Post of August 2, Exhibit 3, entitled "Declares onzi is Now Hopelessly Insolvent". Two days after seeing that rticle went up and got the check for $1,600. Knew Ponzi was eing investigated by various public officials,—by the United States ttorney, the District Attorney of Suffolk County and the State ttorney-General. Was advised by people and by his brother, who as an attorney, to go and redeem his note. Read in the paper that e could take back his money without profit at any time.

On cross-examination witness testified in substance as follows: The paper last referred to was one in which this statement was ound:

"Ponzi Closes—Not Likely to Resume"

After Conference with Pelletier Agrees not to Accept Any More Money until Accounts Have Been Audited"

At the same time, however, Ponzi announced that his offices would remain open for the redemption of notes due and falling due, and for redemption of the principal invested, wherever his customers for any reason wish to withdraw their money from him."

Has been working eleven years in the Herald. His sole motive eading to investment with Ponzi was article in Post. Read articles ppearing day by day from then to August 2d. Knew McMasters, ho wrote the article on August 2d. He had worked on the Herald nd was pretty well known in the newspaper world. The article ritten by McMasters did not influence his judgment in any way. le had no confidence in McMasters' statement.

Went down and talked about his investment with his brother, the ttorney, and as a result of his advice went down August 4th and ithdrew his money. At Ponzi's place nothing to indicate anything xcept a desire to pay over the money as quickly as people wanted it. new nothing about the financial condition of this concern before he t his money. Made no inquiries and did nothing except to read le newspaper articles, and finally to ask his brother's advice. The oney that he had there was substantially all the money he had on rth. He was examined at the office of the trustees a week or so ago. his examination was taken down in writing. Everything he has ated to the court was then stated to the trustees.

On redirect examination witness testified in substance as follows: le read the statement in the Post of the 2d of August—"Owes a remendous Sum. He is over $2,000,000 in debt even if he tried to

met his notes without paying any interest." He also read this statement:

"If the interest is included on his outstanding notes then he is at least $4,500,000 in debt.

88 "Here are the indisputable facts as disclosed by Ponzi's notes. I print the dates and the serial numbers so that any note holder can check them up:

June 8	No. 6,901
June 17	No. 8,965
June 18	No. 9,056
July 14	No. 21,000
July 24	No. 37,000"

At that time witness had his note. He was able to verify from his note, so far as it pertained to that note, whether the statement was true, and he did so. He read the statement:

"It will be seen that from June 8 to June 18, Ponzi was issuing only 200 notes every day. Between June 18 and July 14, he was issuing about 500 notes per day. Between July 14 and July 24 he had jumped his operations to 1,600 per day."

He also read the statement under the heading "No Money Sent Abroad Recently". He read the statement "Stopped by Pelletier". He knew he had been stopped previously by Pelletier. He talked with his brother and his friends about withdrawing the amount of his investment. They all told him he had better take his money out. His brother said he was foolish to take a chance on it. When his brother said this he thought he was taking a chance.

On behalf of the defendant Patrick W. Horan the following dates were introduced in evidence: That the last date for proving claims against the estate was October 25, 1921; that the bill of complaint against said Horan, No. 1580 Equity, was filed on October 24, 1921; that the subpœna against him was issued on October 28, 1921, and dated October 28th, and that said subpœna was served upon the said defendant Horan on November 3, 1921.

Palmer M. Ball, called by the plaintiffs, testified that he was an assistant in the circulation department of the Boston Post in August, 1920. That his records show that 447,650 copies of the

89 edition Monday, August 2, 1920, containing the article "Declares Ponzi is Now Hopelessly Insolvent", Plaintiffs' Exhibit 3, were sold and distributed on August 2d. About 4,000 of that edition were sold in Revere, and about 3,500 in Winthrop on that day. That the average for the year was: City 212,417; suburban 60,948.

Frank W. Murphy, called as a witness by the plaintiffs, testified substantially as follows: He is a jobber in shoe manufacturers' supplies in Boston. He purchased a note of the Securities Exchange Company dated July 22, 1920, admitted in evidence and marked "Exhibit 17," and made payment in cash $600 to one Garrigan,

assistant cashier of the Hanover Trust Company. Witness' signature is on the back of the note. He presented this note at Ponzi's office on or about August 4th, on the same day that he got a check for $800 which he deposited in his account in the Hanover Trust Company on the day he received it. This check was admitted in evidence and marked "Exhibit 18." Witness had heard that Ponzi had been disposing of these notes in large amounts. He had also heard that, although the notes usually read payable in 90 days, Ponzi had been anticipating payment and paying them in 45 days.

As a business man he was in the habit of reading the papers as they came out. He saw them off and on. He was interested in Ponzi's affairs to the extent of $600, and it was a matter of some passing interest to him to see what the newspapers were saying about Ponzi. He knew there was discussion whether it was possible for him to make any uch profit as to permit the payment of 50 per cent in 45 or 90 days. He knew that the question of Ponzi's solvency was being discussed in the papers. He could not say he did see the Post of Monday, August 2d. He came in from Belmont, his home, on the street cars to Harvard Square, thence by the Cambridge subway. There are a great many people reading the papers on the cars. His eyesight is very good.

Witness made a trip to New York City about August 2d, therefore he could neither affirm nor deny that he saw the Post of that day.

There was so much talk pro and con about Ponzi he didn't know what to believe. It was money he couldn't afford to take any risk with or chance with. When witness got to the point he thought the whole thing was a fraud and Ponzi could not do what he pretended to do he immediately wanted his money back. He questioned whether Ponzi could make the profit he claimed in so short a time. He had heard he had been selling very large amounts of these notes, running up into the millions, and that very large sums had been paid out with the additional 50 per cent profit. When he reached the conclusion it was not possible for Ponzi to make that profit in so short a time it did not also occur to him that Ponzi must have been paying out money in profits he took from other investors. When he reached the conclusion Ponzi couldn't have made these profits, he did not come to the conclusion he had been paying out sums of money he hadn't made. That was what he thought in his own mind. He had heard there was a run going on of people rushing to get back the money they had paid in.

On cross-examination witness testified substantially as follows: He was a depositor in the Hanover Trust Company at the time he made the payment to Mr. Garrigan, with whom he had had other financial dealings and upon whom he relied on his financial and business capacity. He secured the money to invest with Ponzi from a loan in the Hanover Trust Company by the pledge of $650 of Liberty bonds acquired in the army. Garrigan assured witness that Ponzi's proposition was sound, that they believed in Ponzi's integrity and that he had evolved some scheme never previously known or thought of on such a large scale. Witness made the investment absolutely in consequence of these representations; received the note

from Garrigan the day he went to ask him to redeem his loan. This was on August 4th. Finally became quite convinced that Ponzi's scheme was preposterous and a fraud.

He read the statement of the postmaster of New York that Ponzi couldn't do the things he professed to do. After that he came to Garrigan and told him he would like if possible his money back; that he couldn't afford to take any risk and didn't want to
91 be a party to anything that was not open and above board. Garrigan said he still had an investment with Ponzi and had confidence in him. He assured witness that Ponzi had a vast amount of money in the Hanover Trust Company, running into a million or millions, on a certificate of deposit there. Despite that, witness told Garrigan he wanted to cancel his investment and get his money back, and gave him the note. Garrigan gave him a note of introduction to Miss Meli, Ponzi's secretary. He took that note and got the money and deposited it in the Hanover Trust Company. In answer to questions by the court the witness stated in substance he asked in no form of words for any profit on the $600. He understood that Ponzi was paying his so-called investors in general at the time he took back his money. When he made his investment he understood he had the option at any time to withdraw the money without profit. He believed Ponzi was engaged in some form of foreign manipulation, out of which profits were derived. When he took his money back he had become unbelieving or doubtful about it.

THOMAS JOSEPH POWERS, called as a witness by the plaintiffs, testified in substance as follows:

He was a clerk employed by the State of Massachusetts. About July 24, 1920, he invested in a Ponzi note through a friend, to whom he gave $500 in cash to invest for him. The note was then admitted in evidence and marked "Exhibit 19." On August 3d he got a check at Ponzi's office for $500 in exchange for the note Exhibit 19. This check was admitted in evidence and marked "Exhibit 20." As soon as he got it he had it certified at the Hanover Trust Company. Before he got that check he wouldn't say he had any doubt but that he read the article in the Boston Post of Monday, August 2, 1920, with the headline "Declares Ponzi is Now Hopelessly Insolvent." Remembers the papers stated there were crowds waiting to get their money back.

Doesn't recall whether or not he read that Ponzi had been stopped from receiving any more money. Knew that Ponzi had been paying visits to various officials,—to the District Attorney, the Attorney-General and the United States District Attorney, and pre-
92 sumed they were all making inquiries about his business, although he didn't know whether Ponzi was under investigation or not and didn't know what Ponzi's business was.

On cross-examination witness testified substantially as follows:

He happened to invest with Ponzi because of considerable talk in East Boston about persons who had received checks for fifty per

ent more than they had paid in. He had actually seen a dividend heck. Withdrew his investment to pay a debt he owed of $200 ontracted about time of or shortly after deposit. May have had ome money in the bank at this time. Doesn't know how much. Made an attempt to borrow the money from his attorney (who it is greed by counsel was also his brother), who told him as he had ome money invested to go and get it and pay his debts with that. Couldn't get the money any other way and so he went down and ithdrew it. Never at any time doubted Ponzi's ability to pay in ull.

Understood when he made the investment with Ponzi he could ithdraw the same before the note matured. Understood from papers Ponzi was dealing in international coupons and foreign exchange. ved the money he spoke of to one Green of Charlestown. Usually ad the Boston Globe in the morning. Over at the office there sually are two or three papers, and after he reads the Globe he enerally glances through them. Probably read all he could about onzi at that time. Presumes he read the article by William H. cMasters, in the Boston Post of August 2d, through. Had known cMasters by sight for eight or nine years, since the first Curley ampaign. McMasters' articles didn't and wouldn't influence him. egards him as a publicity seeker and a man who betrayed Ponzi, hose employ he was in, and who was paid for publishing this rticle in the Boston Post.

Presumes he read McMasters' article of August 2, on page 6, olumn 3, of the Boston Post, in which McMasters explains his con- ection with Ponzi, entitled "Connection with Case," in which Mc- asters states: "Since the appearance of that story (meaning the story in the edition of the previous Saturday) Ponzi has been on the first page of every newspaper in the United States. I was given at first to understand by prominent men that Ponzi s all that he claimed to be."

The following colloquy then took place between counsel regarding aforesaid article in the Post:

"Mr. Sears: I understand that that whole edition of the Post is in.

Mr. Powers: Well, I assume that it is in, but I want to make e of it.

Mr. Sears: That paper is marked.

Mr. Powers: I presume that the entire paper is in; but I want make entirely certain that that part of the article as well as the t part is in. Is my understanding correct?

Mr. Sears: I understand that the whole paper is in * * *."

Presumes he read an article in the Boston Evening Globe of ugust 2d, column 7, in which the statement appears that Ponzi bsolutely Denies He is Insolvent." Witness had implicit belief Ponzi from the start. Defendant then offered the Boston Even- Globe for August 2d, 1920, which was marked "Plaintiffs' Ex- t 21." Remembers statements were made in the Boston Post of y 27th and 28th that Ponzi stated he would honor all his obliga-

tions. Believed that Ponzi was being made the object of persecution by the big banks in Boston. This tended to strengthen his faith in Ponzi. He always thought he was perfectly solvent. Never believed that he was receiving a preference or gaining any advantage over other creditors. Positively did not believe Mr. McMasters' article in the Post of August 2d. Debt of $200 was borrowed to bet on baseball games. Green never pushed him for payment.

On redirect examination witness testified substantially as follows: Doesn't now recall whether he borrowed the money after or just before he made the investment with Ponzi. Felt certain that Ponzi was solvent and expected 50 per cent profit within 45 days. Green was a friend and he considered him a good friend. He did not ask witness for the money. Didn't go to Green and say "If I
94 have to pay you now it means the loss of $250 to me in the next few weeks." Knew that one Pride was making an investigation of Ponzi's affairs and supposed he was employed by some public official. Knew that an accountant's duty is to find out the financial condition of the man examined.

The plaintiffs then offered the Boston Globe for Monday morning, August 2, 1920, which was received in evidence and marked "Exhibit 22." The plaintiffs further offered the Boston Daily Globe of July 30, 1920, which was admitted in evidence and marked "Plaintiffs' Exhibit 23." Defendant testified he never heard nor saw the following article on the second page of Exhibit 23 until his attention was called to it by Mr. Sears in redirect examination, although he may have looked at it at the time, but he does not recollect it:

"Not Enough Coupons in World for Ponzi

"New York, July 30.—Postmaster Patten of the New York Post office today declared the entire world's supply of international postal coupons is not large enough to enable any person to accumulate the fortune which Charles Ponzi, the Boston financier, is said to have made through coupon transactions and foreign exchange."

The plaintiffs then offered the Boston Post of August 11, 1920 with the accompanying statement, which was admitted in evidence. That the references in that paper to previous convictions and the serving of time by Ponzi were the first references of that nature that appeared in any Boston or other newspaper. This evidence was admitted against the defendant Brown only.

Lucy Meli, called as a witness by the plaintiffs, testified that she lived in Revere and was employed by Charles Ponzi as secretary who was located at 27 School Street. In a general way her duties consisted in taking in money and paying out money on notes as they were presented. The larger part of the investments made with Ponzi were made at the School Street office.

There were several agents there who sold notes. Their invariable

practice was to pay 50 per cent in 45 days. She came in
95 contact with the agents and heard the agents talking with customers. Knew the instructions the agents had about stating the kind of business Ponzi was doing. Heard the agents talking with customers. Speaking generally, they told proposed customers the money was sent to a foreign country, that reply coupons were bought and carried into another country where the exchange was nearer normal, and redeemed there, and that was how the gain was made. International reply coupons were the things they were to buy.

On cross-examination witness testified substantially as follows: She knew of no investments being made in foreign reply coupons. She knew of no foreign investments such as were represented by the various agents. She did not know that she would be in a position to know whether Ponzi had paid out money for purchase of international reply coupons. Had access to everything that happened at 27 School Street, which was the office where practically all of the money was paid out. Would have known whether or not any money had been sent to foreign countries for the purchase of these reply coupons. So far as she knew, none had been so sent.

The proceeds of the receipts of the day July 24th and July 23d and July 25th were deposited in the Hanover Trust Company. The deposits were made out at night of the same day. The banks used to wait for their deposit. Did not know that some of this money was placed in enterprises in Boston until after August 15th. Heard that he made an investment in shares of the Hanover Trust Company. After the office closed learned there was another enterprise in which a large amount of money was invested. Think it was Napoli Macaroni Company. Heard Ponzi frequently tell his agents he was investing in foreign exchange. Understood Ponzi had money enough abroad so it was not necessary to send this money there from day to day, and misled witness by leading her to think he had millions of dollars abroad.

"Cross-examination in behalf of the defendant Benjamin Brown.

By Mr. Goldberg:

96 X Q. 1. Now, speaking of the date of August 2, 1920, you were in the office then at 27 School Street?

A. Yes, sir.

X Q. 2. That was your position there, as secretary?

A. Yes, sir.

X Q. 3. And at that time you were instructed, were you not, by Mr. Ponzi, to pay back the money upon the notes as presented, the notes that did not mature——

A. To pay notes as they were presented, matured or not.

X Q. 4. To pay back the full value of the notes?

A. Yes, sir.

The Court: What do you mean by '*face* value'?

Mr. Goldberg: To pay back the original sum paid in. She put it in that fashion, and let us see what her answer is.

X Q. 5. You were instructed by Mr. Ponzi to pay back on August 2 the original sums put in with Mr. Ponzi?

A. Yes, sir.

Mr. Sears: You mean the amounts paid for the notes?

The Witness: We were instructed to pay the notes, matured or not matured.

Mr. Sears: You were instructed to pay notes that had matured at the face value of the notes, that is, 50 per cent more than the original amount paid in?

The Witness: Yes.

Mr. Sears: And on notes that had not matured you were instructed to pay the amount originally paid in as shown on the notes?

The Witness: Yes, sir.

Mr. Sears: That is right.

The Witness: Yes, sir.

X Q. 6. That is, in all cases you were instructed, were you not, to pay the notes as they came in,—the money paid in in the first place, if they did not ask you for any profits?

A. Why, no; we usually looked at the date, and if it had matured, the 50 per cent was paid, too.

X Q. 7. Now, let us see. You understand that Mr. Ponzi gave out the statement in the newspapers that he would pay the money back as originally deposited with Mr. Ponzi?

A. That was if the note had not matured.

97 X Q. 8. Yes, if the note had not matured.

A. Yes.

X Q. 9. And further still, Mr. Ponzi instructed you to pay all the notes as presented, if requested, to the amount of the original sum paid in only,—is that true,—in other words, what I am after is what were the instructions by Mr. Ponzi to you on August 2?

A. To pay notes, if they had matured, with the 50 per cent added; if not, the principal, without interest.

X Q. 10. That is, if the party wanted his principal back, you were instructed to pay it back as the note was presented?

A. Yes, sir.

Mr. Goldberg: That is all.

The Court: When did you go to work for Ponzi?

The Witness: The 13th of April.

The Court: Not prior to that time?

The Witness: No, sir.

The Court: Immediately after that time were notes cancelled by the repayment of the original sums taken from the investors?

The Witness: Yes, in several cases.

The Court: Was there any general announcement that parties could have back their money, without profit, at any time?

The Witness: Well, at any time after the agents explained this, it was perfectly understood that they could have their money at any time for any reason.

The Court: If they left it there 45 days, they would get 50 per cent added?

The Witness: Yes.

The Court: If they chose to take it back in less than 45 days they would get their money back, with no profit?

The Witness: With no profit.

The Court: And that was the practice during the whole period from April down to the end?

The Witness: Yes, sir.

The Court: And when you took back these notes, without the payment of any profit, they were simply marked, indorsed, and put away as cancelled?

The Witness: Yes, sir.

The Court: That is all.

Redirect examination.

By Mr. Sears:

Q. 11. Well, they were 'simply indorsed'? Let me see. That stamp was used invariably, wasn't it? I am showing you now Plaintiffs' Exhibit 19, the note given to Thomas Powers,—received payment August 4, 1920.

A. Yes, sir.

Q. 12. That was the stamp used, wasn't it?

A. Yes, sir.

Q. 13. Was the same stamp used whether the note was paid in full for the face amount, or whether the amount was merely the consideration?

A. The same stamp was used.

Q. 14. The same stamp was used in either case?

A. In either case.

Q. 15. And that was the only cancellation, the stamp, that was ever put on?

A. Yes, sir.

Q. 16. Was that put on in the presence of the person who handed it in, do you know?

A. It was supposed to be.

Q. 17. It was supposed to be. That was the practice?

A. Yes, sir.

Q. 18. That is, it was handed in, was it, and did each of the cashiers have a stamp?

A. At first we had only one cashier, and that would be handed in to see if the indorsement was there, and if it was there the check was passed out to the investor, and then it was turned in, and stamped "Received."

Q. 19. When was the stamp put on?

A. As the check was given out.

Q. 20. Before the check was given out?

A. Well, you see we got the note, and we passed out the check, and at the same time the stamp was put on there.

Q. 21. Yes, stamped as received payment?

A. Yes, sir.

Q. 22. As a part of the same transaction?

A. Yes, sir.

The Court: The investor didn't sign anything, did he, except the note?

The Witness: Just indorsed the note.

The Court: And this stamp was in behind the rail, was it, or what did you have there?

99 The Witness: It was in the possession of the cashier, that is, the one that was handing out the check.

The Court: And where was the cashier?

The Witness: Behind the cage.

The Court: There was a cage there like a bank cage?

The Witness: Yes, sir.

The Court: And these notes were slipped into the cage to the cashier, and the cashier would slide the check out?

The Witness: Yes, sir.

Q. 23. Was the name of the payee of the note also indorsed before a check was given, whether it was a check for the face amount of the note, or whether it was a check for the amount of the consideration?

A. It was always indorsed.

Q. 24. Always indorsed. So that the practice was identically the same, I mean the routine was identically the same, whether a person handed in a note that had not matured, asking for the amount of the consideration, or whether a person handed in a note that had matured, and asked for the payment of the face of the note?

A. The same.

Q. 25. The same procedure. Was payment in all cases made by check?

A. In all cases except two or three that Mr. Ponzi himself paid in cash.

Q. 26. Yes. But in all other cases where any of the cashiers, or Ponzi himself, made payments, the payments were by check?

A. By check."

Recross-examination by Mr. Devine in behalf of the defendant Crockford:

Up to August 2d witness believed Ponzi's scheme was genuine and that he would meet all his payments, nor was there anything that led her to believe but what he was solvent in every way and his customers would be paid in full.

On redirect examination witness testified that she went to 27 School Street on the 13th of April and remained there; that Ponzi stopped taking in money on July 26th.

All the defendants were repaid by checks on the Hanover Trust Company.

100. "Q. 27. Were the receipts of July 22d deposited in the Hanover Trust Company?

Witness: I don't recall about July 22d because that was the time something happened between the Tremont and the Hanover so that there were probably some going to the Tremont and some to the Hanover on that day."

RALPH L. LONGDEN, recalled as a witness for the plaintiffs, testified in substance as follows:

That he had had general supervision of the receivers' and trustees' books since the receivers were first appointed; that from the amount of dividend checks sent out to creditors who had proved claims against the estate of Charles Ponzi he was able to state the amount of liabilities proved and allowed against the estate, which was approximately $3,440,000; that a dividend of 10 per cent had been paid, which was based on the investment value, that is the consideration named in the note; that in his opinion Ponzi was insolvent at all times from the time he started business, whether you consider his liabilities at investment value or the face value of the notes.

That on July 19 Ponzi had an account in the Hanover Trust Company under the name "Pio Conti;" that on July 22d he opened an account under the name "Securities Exchange Company," the Pio Conti account continuing along with it; that the Pio Conti account was closed on August 4th and the Securities Exchange account on August 3d, the latter being closed into an account under the name "Lucy Martelli, Trustee," which, as far as witness could find out, was a fictitious name.

That if you consolidate all of these accounts into one account and assume that Benjamin Brown paid in $600 on July 20th and on that date this was deposited in the Hanover Trust Company to the credit of Charles Ponzi, the balance on deposit on July 20th would be exhausted by July 27th by the payment of checks to depositors; that this answer was given on the assumption that no new deposits were made in the meantime; that as a matter of fact there was on deposit on July 27th, $1,107,000, and on July 20th $681,000; that up to July 26th the deposits were almost all of investors' money;
101 that the source of this additional money after July 26th was almost entirely transfers from other banks of investors' money.

That the defendant Crockford's check was apparently deposited in the Hanover Trust Company July 26th; that Ponzi's balance on the 26th of July was $884,000; that that balance was exhausted by the payment to depositors by the 29th of the same month; that the actual balance on July 29th was $1,059,000; that payments added to the account after July 27th came almost wholly from transfers from other banks and were the proceeds of investors' money; that on July 22d there was standing to Ponzi's credit at the end of the day $736,000; that assuming that the defendant Holbrook's money was deposited with the Hanover Trust Company on the 22d of July, Ponzi's deposit would have been exhausted, assuming no new money

came into it, on July 28th; that the amount of the balance at the close of the 28th of July was $1,159,000, the money coming in in the meantime being almost wholly from transfers from outside banks of moneys received from investors.

That assuming that the money paid by the defendant Horan was deposited in the Hanover Trust Company July 24, the balance to Ponzi's credit at the close of business July 24th was about $872,000; that assuming no new deposits were put in, this balance would have been exhausted by the payment of checks to investors on the 28th of July; that the balance to the credit of Ponzi at the close of business on the 28th of July was $1,159,000; that the intervening deposits came from transfers from other banks of money paid in by investors.

That assuming that the amount paid by the defendant Murphy was deposited in the Hanover Trust Company July 22d, the amount to the credit of Ponzi at the close of business July 22d was $736,000; that assuming there was no addition to his account that balance would have been exhausted by the payment of moneys to investors on the twenty-eighth day of July; that the balance to the credit of Ponzi at the close of business on the 28th of July was $1,159,000; that intervening money came from transfers from outside banks of money paid in by investors.

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That assuming that the amount paid by the defendant Powers was deposited in the Hanover Trust Company July 24th, the amount to the credit of Ponzi at the close of business July 24th was about $872,000; that assuming there was no addition to his account that balance would have been exhausted by the payment of moneys to investors on the 28th of July; that the balance to the credit of Ponzi at the close of business on the 28th of July was $1,159,000; that intervening money came from transfers from outside banks of money paid in by investors.

That on August 4th at the close of business Ponzi's balance was $313,737.08; that all the various balances which witness has testified were to the credit from time to time of Ponzi's account were taken from the bank's figures and showed balances at the end of the day, and that in figuring when each balance would be exhausted by the payments out the witness charged against such balance all checks which the check book records show were subsequently drawn, whether they had actually been presented for payment or not; that this would amount in effect to there being no outstanding checks; that while witness has never examined each individual check, his impression is that in the great majority of instances the checks were presented immediately for payment, particularly during the period beginning with the 26th of July, many of the checks being certified, which would amount to a charge against the account on that day.

That the latest date of exhaustion of Ponzi's balance in respect to any of these defendants who made payments to him was July 29, 1920; that the amount of checks drawn on July 30th was $266,540; July 31st, $129,022; August 1st was a Sunday; August 2d, $546,119; August 3d, $344,777; that the balance at the close of business August 4th was $313,737, on the 3d only $20,000; that there were de-

posits on the 3d of $541,000 and on the 4th of $291,000, presumably from other banks.

That the proceeds of three notes of $80,000 each, one of Mirski, one of Dackiewitz and the other of Meli, were discounted, as witness was informed, at the Hanover Trust Company and the proceeds credited to Ponzi's account on August 3d; that with this exception, based on witness' study of accounts and records, the proceeds that went into the Hanover Trust Company were entirely moneys which either were deposited directly in the Hanover Trust Company or moneys that were deposited in outside banks and that reached the Hanover Trust Company by transfers from these banks; that these deposits represent such moneys until the 3d of August, and then the balance was increased by the $240,000 from the three notes of $80,000.

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At this point Mr. Sears made the statement that at a time the three notes for $80,000 were in existence there was a certificate of deposit for $1,500,000 running to Charles Ponzi and those three notes were paid, as the Hanover Trust Company claimed, by the splitting up of that certificate of deposit of $1,500,000 into three certificates of deposit of $500,000 each, and the transfer of one of these $500,000 certificates of deposit to pay the three notes for $80,000 each above referred to and an overdraft of some $200,000 more.

Mr. Sears further stated that there came into the possession of the receivers at the time that they were appointed three certificates of deposit—two $500,000 and a third for approximately $58,000, each dated July 22, 1920, but in fact dated back, counsel for defendants agreeing that this statement might be received as evidence in the case.

Witness further testified that the withdrawals for the certificate of deposit of $1,500,000 do not appear on Exhibit 24, which the witness prepared, because according to witness's recollection that certificate of deposit was paid for by some checks previously drawn, the date of which he does not remember.

A transcript of the account of the Hanover Trust Company with Vio Conti, the Securities Exchange Company and Lucy Martelli, Trustee, from July 19, to August 11, 1920, was then introduced in evidence and marked "Plaintiffs' Exhibit 24" (a copy of this is printed among the exhibits in the case). The witness further testified that the figures on Exhibit 24 are taken from statements rendered by the Hanover Trust Company and are not witness's figures.

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On cross-examination the witness testified that he had made as complete an audit as he could of Ponzi's affairs, and that subject to certain comments he was unable to account for the disposition of an amount equal to about $180,000, and further, that he was unable to account definitely where the money came from for Ponzi's Hanover bank stock.

At this point the plaintiffs stated that the referee in bankruptcy at the first meeting of the creditors of Charles Ponzi ruled that investors were entitled to prove only for the amount actually paid

in, that is the investment value of their notes, and not for the face value of the notes, and that this decision had been acquiesced in by all creditors and no appeal taken from it. The plaintiffs further stated that in addition to the amount of claims proved and allowed, of approximately $3,440,000, there are claims exceeding $500,000 in amount which have been offered for proof, have been objected to and action suspended thereon, no decision yet being made; that the principal ground of objection to these claims is that the persons who have offered them for proof received profits on previous transactions.

These statements were received as evidence subject to the defendants' exceptions, on the ground not as to the manner in which the facts were proved, but that the facts themselves were immaterial.

The plaintiffs then rested.

In his opening statement counsel for one of the defendants stated:

"Perhaps we can also shorten up the evidence on the defendants' side if we understand that it is agreed that Ponzi entered into a swindling scheme for the purpose of defrauding and cheating his customers and those who invested with him.

The Court: I shall find also, unless the evidence is controlled, that he was engaged in a swindling scheme, the gist of which was that by falsely pretending that through the use of international postal coupons, or some manipulation of foreign exchange, he
105 was enabled to make within a short time 100 per cent on all money entrusted to him, and was generously sharing this profit equally with his investors. That is what was agreed in the other case, and I should find it on the record in this case unless you controlled the evidence that is before me.

Mr. Devine: Then I shall not put in any evidence on that. * * *"

Joseph H. Callahan, called by the defendant Crockford, testified that he was employed by the Boston Globe. He produced the Globe of August 2d in which appears the following article:

"Ponzi Absolutely Denies He Is Insolvent—Alleges Malice

Dictates Reply to Attacks

Runs on Offices for Payment of Notes He Gave

Ponzi's Statement Regarding Attack

A statement dictated by Charles Ponzi to his stenographer and edited by Joseph W. Fowler of 53 State St., Ponzi's general legal advisor, follows:

'As far as being insolvent, I absolutely deny the allegation. Since the responsibility of deciding this issue is today in the hands of Mr. Pride, the auditor appointed by the United States authorities, I feel

any statement coming from any other source than Mr. Pride should be taken entirely for what it seems to be worth.

There is a desire to embarrass the investigators, a desire to turn public opinion against me, and a desire on the part of others to eventually cover something that a favorable investigation of my affairs might disclose to their detriment.

It is further apparent that there is nothing but malice back of the statements that Mr. McMasters and others have so widely published. I feel that there is a deliberate attempt to prevent me by all means from working for the benefit of the public in general. Should I be able to realize fully my dreams, such a realization would mean the downfall of an autocratic clique which has been able to prey upon the credulity of the people.

106 Paid Nearly $3,500,000

I do not ask the public to refrain from demanding of me payments of their matured notes, or refunds on their unmatured notes. All I ask of them is that they come in an orderly manner. I am there to pay and pay in full, as I have done in the past week. My resources are stronger than the resources of certain interests. I doubt very much if any other individual or group of individuals could have faced for five days a run which amounted to nearly $3,500,000. The story that my payments have not exceeded $60,000 a day is untrue. From one certain account the total amount of withdrawals was $1,872,334.12.

In addition, from my own personal account my payments amounted to approximately $900,000. From another personal account the same amounted to $50,000. All of these payments have been made in the city of Boston.

I have no figures as yet to return of the total amount paid out by the branches, but I safely assume the amount will exceed the one half million dollar mark. These are figures that I can conclusively prove to the satisfaction of any honorable person.' "

In the same article appeared the title: "Tense Concentration on Work of Auditing Notes." There was also another article—"McMasters in Conference with Asst. U. S. Attorney." In the same paper the following article appeared:

"Throngs Gather in Long Lines

Ponzi frenzy has taken Boston by storm today, following the publication of a statement in the Boston Post by William H. McMasters, who was engaged by Judge Leveroni, Ponzi's attorney, to act temporarily as publicity agent in Ponzi's interests and who charges 'Ponzi is insolvent' and further intimates that Ponzi is suffering from a 'brain storm' as a consequence of his tremendous financial undertakings and his wanderings among the prosecuting 107 authorities of the State and Nation, to whom he made explanations of his operations.

Pi Alley, Court Sq., City Hall Av. and School St. were thronged with eager, anxious holders of these Ponzi notes at 8 this morning and by 9 Capt. Sullivan of the Court-Sq. Station had an extra detail of sergeants and policemen in the streets, keeping the crowds in line and making them behave in an orderly manner.

Ponzi's subordinates opened his offices an hour earlier than usual this morning, and began in the same orderly manner paying off the obligations to his patrons. By 10 a. m. the crowds had grown to large numbers and it was estimated there were several thousand men and women lingering in the long lines leading to the windows where the cashiers were paying off or redeeming the Ponzi notes."

In the Globe of August 4th the following article appeared:

"Ponzi Pays all Comers—Federal Agent Arrives

Accountant Storch from Washington Confers with Pride—Spring Engaged by Atty. Gen. Allen to Investigate the Business—Supporter's Circulars Defend Ponzi

Auditor Finds Few Inaccuracies of Detail—McMasters Sued and Takes Counter Action

Financier Winds Up Busy Day with a Theatre Party and Sees Himself in Movies

* * * * * * *

As on Monday, the doors were closed at 2.30, there being at that hour all inside who could be paid by 5 o'clock. The people left outside dispersed more quickly and quietly than on Monday, possibly because there was more show of police. There was no repetition of the near-riot that characterized Monday afternoon.

For one thing, though the morning crowd was bigger, it was either handled faster or dispersed by other means faster than on Monday. There were not so many left outside when the doors closed.

108 This was partly due to the fact that speculators did some business with the waiters-in-line, buying notes that had not yet matured at $10 or $20 less than they called for. Doubtless, also, some people left the line because their confidence came back to them.

Certainly it was true that of 60 persons asked, only 5 had notes already matured."

"Ponzi Makes a Speech

* * * * * * *

"Mr. Ponzi came to his office late, joked with the reporters, sketched out a new $100,000,000 scheme, with profit sharing banks and lines of steamships and railroads as mere subsidiaries; he made his progress up to the Common, was hailed with acclaim by an admiring mob, and wound up at the Hotel Bellevue, where he was a guest of Carl Barrett at the weekly luncheon of the Kiwanis club.

He made a brief after-luncheon speech.

'I am not a financial wizard,' said he. 'I'm a financial lizard; dealer in postage stamps and bankers' goats.' And he made an appointment to be the principal speaker at next Tuesday's luncheon of the club."

In the Globe of July 27th there appeared the following article:

"Announcement was made in behalf of the company that it would pay any notes that mature and refund to any depositor who wishes his money back before maturity, but without interest. Inquiry at 27 School St. late yesterday afternoon, however, failed to disclose any rush of panic-stricken investors; there were hundreds, on the other hand, who received principal and interest on moneys invested June 11."

Also:

"Dist. Atty. Gallagher made the following public statement:

'I am informed by the postal authorities that the United States Government is the largest user of international reply coupons in the world. The entire issue for the past 12 months of our government is only a small fraction of the entire number which must have been handled by Ponzi to account for the tremendous income which he claims to have made since December last.

He has offered to suspend business for such time as it may take to have his books audited to show whether he has resources with which to meet his obligations; that during the suspension of business he will pay any notes that mature and refund to any depositor who wishes to have his money back before maturity without interest. He says also that he probably will not resume business after the audit is made.

I understand that the Attorney General and the district attorney for Suffolk County have had a similar offer made to them looking to an audit. At this moment I am not clear that such an audit would be of any material value to the United States Government. The question of whether or not this office will take part in such an audit is for the present under advisement.'"

The witness further testified that in the Globe for July 28th there was an article stating:

"Ready to Redeem Notes

"The petition was opposed by Samuel L. Bailen of Bailen & Leveroni, counsel for Ponzi, on the ground that his client was ready to redeem notes as fast as they mature and that any holder of a Ponzi note who wished to collect his deposit before maturity would be given the principal. Attorney Bailen related the details of a conference at Ponzi's Lexington home the night before, at which Judge Leveroni, Attorney Bailen, Attorney Wyman of Manchester, N. H., the cashier of the Merchants National Bank of that city and Ponzi's Manchester agent, were present. Mr. Bailen declared that Ponzi's liabilities in Manchester were $150,000, whereas his assets in the Merchants' National Bank of that city amounted to $450,000.

110 Judge Wait refused to enter an order of notice and Mr. Stoneman withdrew his bill."

In the same paper there also appeared:

"Post Office Department Still Puzzled by Ponzi

"Washington, July 27.—Postoffice Department officials are at sea on the money-making game of Charles Ponzi, who is said to have made millions by manipulating exchange. They assert that it is impossible for the Boston financier to have made anything like $8,500,000 trading in 'international reply coupons.' Had he used $5,000,000 to make his purchases he would not have netted more than $83,000."

In the Boston Herald for August 2d the following article appeared:

"Ponzi Denies He is Insolvent—Will Prosecute

Ridicules Story in a Morning Paper that He is a Faker

"Charles Ponzi was asked early this morning regarding the statement by William McMasters, published in another morning newspaper, who asserted that the financial king is insolvent and has no money with which to meet his obligations.

Mr. Ponzi declared that McMasters who has been publicity man for Ponzi during the last few days, is not telling the truth and that McMasters never was in a position to have actual knowledge of Ponzi's financial standing or of his business.

'There is not a bit of truth in McMasters' statement,' said Mr. Ponzi. 'He has no authority for making such statements. They are absolutely untrue. I have twice as much money as will be needed to meet any obligations that may be presented me. He was doing publicity work for us only a few days. I shall see my attorney this morning about McMasters' statements in this morning's newspaper.'"

In the Boston American for August 2d an article appeared stating:

111 "Insolvency Charge is Denied by Ponzi

Will Continue to Pay Notes

Charles Ponzi, Boston's financial 'wizard,' in an exclusive interview with the Boston American branded the published report that he was insolvent as untrue, and that to prove it he would continue to pay off the bearers of notes issued by the Securities Exchange Company today at his office at No. 27 School Street, and that this policy would continue until he had met all outstanding obligations.

Ponzi further declared that the statements credited to William H. McMasters, employed as publicity agent for Ponzi by his counsel, are without foundation, and that the publicity man's charges were

prompted by revenge growing out of the disposition of $2,200 which the financier had given him for insertion of advertising matter.

The serious nature of the charges against him warrant consultation with his counsel, he said, and that a suit for damages may be brought against those responsible for the unsupported accusations.

Sends Cash Abroad Regularly

'McMasters' statement that I have not sent money abroad and that it has not taken the course of my system of operations and returned to the country with heavy profits is entirely false,' said Mr. Ponzi. 'I have sent funds abroad very recently, as my agents could testify to, were I in a position to divulge who they are. It is quite true that I have sufficient funds abroad to operate exclusive of my funds in America, yet I have been sending money to my agents regularly.

Furthermore, I cannot understand why McMasters should make the statements he has, regarding my business, when, in fact, he has no means of knowing anything about the matters on which he bases his declarations. I repeat that nobody in this world, to my knowledge, knows anything about my system of operation, not even my agents, who have been instructed to make certain transactions.

I never confided in McMasters nor sought his advice, as he states. Whatever knowledge he possesses of my business has been in the nature of publicity or advertising work. Many of his statements are so absurd that they are not deserving of an answer, since a denial might only lend credence to his wild talk.

McMasters was employed by my counsel, Judge Frank Leveroni, to do some publicity and advertising work and altogether was employed by him for not more than a week. He was wholly answerable to Mr. Leveroni for what work he did for the Securities Exchange Company, as I instructed my counsel to look after this matter for me.

* * * * * * *

Asks Public to be Patient

I cannot understand his attitude, particularly for a man to betray whatever measure of confidence I had reposed in him. As for my business he has betrayed no secrets. I can pay out double the amount needed to meet all my financial obligations and ask the public to be patient and wait the results of the audit of my company's books.

Whatever influence is behind McMasters, aside from his so-called desire to tell the public many things which I can prove are not true, I cannot say now.

Big interests have tried and are trying to circumvent me, but I have beat them all thus far, and I assure the public that when this controversy is over my name will be clear and perhaps several others won't look so nice.'"

PALMER M. BALL, on being recalled by the defendant Crockford, testified that the Boston Post of July 27th contained the following:

113 "Will Pay All Obligations

'Meantime I shall pay all maturing obligations as fast as presented. (This is supposed to be from Ponzi.) Further—during the auditing of the books any persons holding unmatured notes can receive back their original investment, without interest, if they desire.'

He signed his name to this.

Soon after Ponzi had written his advertisement despatches were received by the Post from Massachusetts and New England cities and towns telling of the closing of Ponzi's offices in those places. A despatch from Manchester, N. H., recounted how the branch office there had been closed upon the advice of the chief of police, M. J. Healy."

The same paper contained the following article:

"Ponzi Closes—Not Likely to Resume

"After Conference with Pelletier Agrees Not to Accept any More Money Until Accounts Have Been Audited and Standing Established—Will Pay Loans and Interest Due and Principal on Notes Not Due

Ponzi Also Confers with U. S. Dist. Atty. Gallagher and Atty-General Allen

Gallagher States Ponzi Says He Probably Will Not Accept More Loans"

The same paper contained an advertisement of about four inches by six inches in size stating:

"Public Notice

"I have made a personal agreement with District Attorney Pelletier to cease receiving funds from the public for investment with the

Securities Exchange Co. 27 School St., Boston (and All Branches)

until after a final audit is made to determine my solvency
114 and satisfy him that my methods of financial operations are thoroughly legitimate.

Meantime I shall pay all maturing obligations as fast as presented.

Further—During the auditing of the books any persons holding unmatured notes can receive back their original investment, without interest, if they desire.

Charles Ponzi."

The witness further testified that in the Post for July 28th, 1920, appeared the following:

"Will Honor Obligations

"At the same time I have posted in my office notices to the effect that payments will be continued as usual on matured notes, and that also all investors who desire a refund of the principal immediately may obtain the same.

I wish the public would be orderly in presenting their demands for payment, because all obligations will be honored. The lack of police protection, which has been withdrawn from me since I have discontinued receipt of investments should not be taken advantage of by the public, because, while any disorder that may arise does not concern me, so far as material damage to my property, but affects me so far as the people themselves are concerned, I do not want unnecessary crushing, any rioting, or any acts that may be apt to prejudice the welfare of my customers.

Appeal to Public

And since I cannot secure through the authorities the proper protection to which they are entitled and to which I am entitled I have decided to appeal directly to the public to show the degree of judgment that seems to be lacking in high quarters."

In the same paper appeared the following article:

"Boston News Bureau Finds Nothing in Postal Figures to Indicate Alleged Operation in Coupons

"Whatever the district attorney's audit, or other official investigation, may show concerning the books and operations of Ponzi and his Securities Exchange Company, there are certain obvious circumstances which raise some questions in banking minds.

Whence Come Profits?

In brief, why don't postal operations reflect Ponzi's operations? Has not Ponzi's theoretical field been narrowed to nearly the vanishing point? Is it purely philanthropy that counsels the further sharing of such handsome profits with the public? Why are such large amounts kept here, in investment or on deposit, instead of being instantly set to work abroad to earn 200 per cent a year—or, in practice, 400 per cent a year?

Post office business fails to indicate the supposed activity in realizing here on these coupons. Is Switzerland, one of the few other countries with exchange at par, being used? Or are the coupons received from abroad being warehoused in bales, for later redemption? In which case, whence came the profits that were being paid?"

RALPH L. LONGDEN, recalled as a witness for the defendants, testified that as requested he had prepared a schedule similar to Exhibit 24, in which he had divided the deposits in the Hanover Trust Company into two classes—"Transfers from banks" and "Deposits from other sources." This table was introduced in evidence by the defendants and marked "Exhibit 25."

Witness could not tell what specific investors' money went into the deposits as shown by the Hanover Trust bank statement and what specific investors' money was taken out of those deposits during the period covered by Exhibit 25. Witness had no way of identifying whose money went in and whose money was taken out so far as persons are concerned.

116 CHARLES PONZI, called as a witness by the defendants, testified as follows:

That he was called in a rather urgent manner down to the Hanover Trust Company on the 22d of July and requested by the president and treasurer to place some of his money in a certificate of deposit because his balance was getting a little too large; that he objected, but they insisted, claiming that the Fourth Atlantic National Bank, which was doing the clearing of the Hanover, was not able to clear his checks if he had taken it upon himself to draw checks for the entire balance, so that to protect the Fourth Atlantic he agreed to put $1,500,000 in a certificate of deposit; that this was the sole purpose for which this certificate of deposit was issued; that the sole purpose of the certificate of deposit was to enable the Fourth Atlantic to clear any checks that might be drawn against his account, as it cleared for the Hanover Trust Company; that there was no change whatever in the certificate to the time it was exchanged for three certificates of deposit, referred to in the evidence; that he started in business in December, 1919, continued to receive money until July 26, 1920, and to pay out money to August 9th; that he had a man by the name of McMasters working for him, who on August 2d issued a statement through the Boston Post regarding his solvency; that he recalled making statements in the newspapers denying the statement of McMasters and claiming he was solvent and that he would pay back to any depositor the invested sum on unmatured notes if they desired it.

On cross-examination witness testified that six checks signed by him, for $200,000 each, dated July 17, 1920, and certified on that date by the Hanover Trust Company, were subsequently transferred for the certificate of $1,500,000; that that made $1,200,000; that his check for $300,000 payable to the Hanover Trust Company, dated July 22, 1920, stamped "Hanover Trust Company, July 22, 1920," made up the balance, or $1,500,000 in all, for which he received the certificate of deposit. All of these checks have the stamp on the back—"Hanover Trust Company, July 22, 1920. Paying Teller."

117 EUGENE J. GROSS, called by the defendant Brown, testified that on July 20, 1920, he invested $600 with Ponzi. He took a note in the name of his friend Benjamin Brown. He did this in

order that notices which might be sent out should not come to his home and his family know that he had invested money with Ponzi. A few days afterward he gave the note to Brown to hold for him; that his account at the Cosmopolitan Trust Company showed the withdrawal of $600 on July 20 and the credit of $600 on August 2, 1920. It was agreed between counsel that $600 paid to Ponzi was Brown's and that the other $600 paid to Ponzi was Gross'.

On cross-examination he testified that he was an infant. That he told Brown he was going to invest in his name. He left the note with Brown. He never said anything to Brown about withdrawing the note; the latter did it on his own initiative.

EDWARD C. MACK, JR., called as a witness for the plaintiffs, testified substantially as follows:

That he was employed by the Trustees of Charles Ponzi to collect certain claims for alleged preferences, that among a number of claims turned over to him was a claim against Patrick W. Horan; that he received a bunch of cards from the Trustees some time in May which he and his associate classified, had form letters printed which they began sending out on the 29th of May. As the letters were mailed they marked each one of the cards with a "V" and Horan's card has a "V" mark on it; that he had no doubt whatever that such a notice was sent to Mr. Horan. The plaintiffs then offered a copy of the notice sent out by the witness, which was admitted in evidence and marked "Exhibit 30". That they received no reply from Horan, the letter did not come back, and about the middle of July they sent a second notice to him in a similar envelope, a copy of which was offered in evidence and admitted and marked "Exhibit 31"; that Horan's card was marked with an "X" which means a second notice was sent; that they sent him no further notice; that they never heard from Horan either personally or by counsel or by letter, and that the letters they sent did not come back.

118 On cross-examination the witness testified that he could not positively say that he had any recollection of having sent either of those letters, but remembered going over in the office and checking up the letters and this letter was among those that were sent; that he thought he could truthfully say he had a distinct recollection of sending Mr. Horan's notices, copies of which have been put in; that they were simply given the boy to mail along with the regular office letters; that he knew nothing about mailing them; that they had approximately 300 of these claims; that they had no reply from Mr. Horan.

At the conclusion of the evidence and after argument, with the consent of all parties, the plaintiffs were permitted to file an additional statement prepared by the witness Longden, showing in more detail the nature of the deposits in the Hanover Trust Company set forth on Exhibit 25. Said statement was admitted in evidence and marked "Exhibit 26".

Approved: John H. Devine, Attorney for Defendant Crockford.
Approved: Louis Goldberg, Attorney for Benjamin Brown.
Approved: William H. Powers, Jr., Attorney for Thomas J. Powers.
Approved: Edward A. Counihan, Jr., Attorney for Frank W. Murphy.
Approved: Michael J. Horan, Attorney for Patrick W. Horan.
Approved: J. P. Dexter, Attorney for H. P. Holbrook.
May 2, 1922. Approved: George W. Anderson, Cir. Judge.

119 EXHIBITS

EVIDENCE: PLAINTIFFS' EXHIBIT 1

1263, 1182, 1578, 1580, 1612, 1166, 1642. Eq.

No. 25672. Boston, Mass., Jul. 24, '20.

The Securities Exchange Company

for, and in consideration of the sum of Six Hundred Dollars Only Dollars, receipt of which is hereby acknowledged, agrees to pay to the order of Benjamin Brown upon presentation of this voucher at ninety days from date, the sum of Only Nine Hundred Dollars Only Dollars, at the Company's office, 27 School Street, Room 227 or at any Bank.

$900.00

The Securities Exchange Company, Per Chas. Ponzi. A. E. K.

[On back:] Benjamin Brown. Received Payment Aug. 2, 1920. Entered C. F. R. & Co. Internal Revenue stamps cancelled—14 cents.

EVIDENCE: PLAINTIFFS' EXHIBIT 1A

1263, Eq., & Other Cases

L

Hanover Trust Company

Boston, Mass., Aug. 2, '20. No. 2216.

Pay to the order of Benjamin Brown $1,200 00/100—Twelve Hundred Dollars—Dollars.

Securities Exchange Co. Lucy Meli Trustee.

Main Office 268 Washington Street.
Branch Office 222 Hanover Street.
[On back:] Benjamin Brown Savings Dept.

120 EVIDENCE: PLAINTIFFS' EXHIBIT 2

1263, Eq., and Other Cases

No. 16754. Boston, Mass., Jul. 20, 1920.

The Securities Exchange Company

for, and in consideration of the sum of Exactly Six Hundred Dollars Exactly Dollars, receipt of which is hereby acknowledged, agrees to pay to the order of B. Brown upon presentation of this voucher at ninety days from date, the sum of Exactly Nine Hundred Dollars Exactly Dollars, at the Company's office, 27 School Street, Room 227 or at any Bank.

$900.00.

The Securities Exchange Company, Per Chas. Ponzi. J. M.

[On back:] B. Brown. Received Payment Aug 2, 1920. Entered C. F. R. & Co. Internal Revenue stamps cancelled—18 cents.

EVIDENCE: PLAINTIFFS' EXHIBIT 4

1263, Eq., & Other Cases

Framingham, Mass., July 22, 1920. No. 677.

Framingham National Bank 53-341

Pay to the order of Attilio C. Mazzola $1,000 00/100—One Thousand Dollars—Dollars.

Holliston Garage, By H. P. Holbrook.

Stamped: Paid Jul. 23, 1920, Framingham National Bank.
[On back:] Attilio Mazzola. Pay to the Order of Framingham National Bank. Securities Exchange Co.

121 EVIDENCE: PLAINTIFFS' EXHIBIT 5

1263, Eq., & Other Cases

No. 34,173. Boston, Mass., 7-22-20.

The Securities Exchange Company

for, and in consideration of the sum of Exactly One Thousand Dollars Exactly Dollars, receipt of which is hereby acknowledged, agrees to pay to the order of H. P. Holbrook upon presentation of this voucher at ninety days from date, the sum of Exactly Fifteen Hundred Dollars Exactly Dollars, at the Company's office, 27 School Street, Room 227 or at any Bank.

The Securities Exchange Company, per Chas. Ponzi. M-L.

[On back:] H. P. Holbrook. Received Payment Aug. 4–1920. Entered C. F. R. & Co. Internal Revenue stamps cancelled—30 cents.

EVIDENCE: PLAINTIFFS' EXHIBIT 8

1263, Eq., & Other Cases

Framingham, Mass., Aug. 30, 1920. No. 678.

Framingham National Bank 53–341

Pay to the order of Harry Bell $400.00/100—Four Hundred Dollars—Dollars.

Holliston Garage, By H. P. Holbrook.

Stamped: Paid Aug. 3, 1920, Framingham National Bank.

[On back:] Harry Bell. Pay to the Order of any Bank or Trust Co. Prior Endorsements Guaranteed First National Bank of Marlboro 53–324 Marlboro, Mass., 53–324. George E. Creeler, Cashier. Any Bank, Banker or Trust Co. or Order The First National Bank Aug. 2, 1920, 5–39 of Boston 5–39. Prior Endorsements Guaranteed. B. D. Blaisdell, Cashier.

122 EVIDENCE: PLAINTIFFS' EXHIBIT 9

1263, Eq., & Other Cases

Boston, Mass., Aug. 4, '20. No. 4298.

Hanover Trust Company 5–161

Pay to the order of H. P. Holbrook $1,000.00/100—One Thousand Dollars—Dollars.

Securities Exchange Co. Lucy Martelli, Trustee.

Main Office 268 Washington Street.
Branch Office 222 Hanover Street.
[On back:] H. P. Holbrook.

EVIDENCE: PLAINTIFFS' EXHIBIT 10

1263, Eq., & Other Cases

Statement of Account with Framingham National Bank

Holliston Garage

Date.	Checks.	Date.	Deposits.	Date.	The last amount in this column is your balance as rendered.
	Balance brought forward ☞			Jul. 1–1920.	523.03
Jul. 2.	50.00	.....	.....	Jul. 2.	473.03s
		Jul. 8.	145.00	Jul. 8.	618.03s
Jul. 10.	150.00			Jul. 10.	468.03s
Jul. 12.	12.40			Jul. 12.	455.63s
Jul. 19.	4.20			Jul. 19.	451.43s
		Jul. 20.	1,350.00	Jul. 20.	1,801.43s
Jul. 23.	1,000.00	Int. 23.	1.02	Jul. 23.	802.45s
Aug. 3.	400.00			Aug. 3.	402.45s
		Aug. 4.	60.00		
		Aug. 4.	1,000.00	Aug. 4.	1,462.45s
Aug. 9.	7.48			Aug. 9.	1,454.97s
Aug. 13.	300.00			Aug. 13.	1,150.64s
	4.34				
Aug. 17.	400.00			Aug. 17.	750.63*
				Aug. 20.	750.63*

123 This is a true transcript of the account of Holliston Garage, H. P. Holbrook, Prop., from July 1, 1920, to August 20, 1920.

Lyman H. Hooker, Cashier of Framingham National Bank.

Subscribed and sworn to by Lyman H. Hooker, Cashier, this 17th day of February, 1922. Before me

Fred L. Oaks, Notary Public. [Seal.]

Please examine at once. If no errors are reported in ten days the account will be considered correct. Always preserve this statement and cancelled vouchers. Notify promptly of change in address.

EVIDENCE: PLAINTIFFS' EXHIBIT 11

1263, Eq., & Other Cases

No. 2937. Boston, Mass., Jul. 24, 1920.

The Securities Exchange Company

for, and in consideration of the sum of Exactly One Thousand Dollars Exactly Dollars, receipt of which is hereby acknowledged, agrees to pay to the order of H. W. Crockford upon presentation of this voucher at ninety days from date, the sum of Exactly Fifteen Hundred Exactly Dollars, at the Company's office, 27 School Street, Room 227 or at any Bank.

$1,500.00.

The Securities Exchange Company, Per Chas. Ponzi. J. M.

[On back:] H. W. Crockford. Received Payment Aug. 2, 1920. Entered C. F. R. & Co. Internal Revenue stamps cancelled—83 cents.

124 EVIDENCE: PLAINTIFFS' EXHIBIT 12

1263, Eq., & Other Cases

L. Boston, Mass., Aug. 2, '20. No. 3025.

Hanover Trust Company. 5–161

Pay to the order of Harold Crockford $1,000.00/100—One Thousand Dollars—Dollars.

Securities Exchange Co. Angeline R. Locarno, Trustee.

Main Office 268 Washington Street.
Branch Office 222 Hanover Street.

Stamped: Good when properly endorsed Payable only through Boston Clearing House Aug 2, 1920 Hanover Trust Company C. A. Ganghan.

[On back:] Harold Crockford. Winifred Crockford. Any Bank Banker or Trust Co Aug 3 1920 Metropolitan Trust Co. Savings Dept. Pay to the order of Merchants National Bank of Boston Prior endorsements guaranteed Equitable Trust Co. of Boston W. H. Pratt Cashier Received payment through Boston Clearing House Merchants National Bank F. C. Waite Cashier.

EVIDENCE: PLAINTIFFS' EXHIBIT 14

1263, Eq., & Other Cases

Winthrop, Mass., July 24, 1920. $1,000.00.
Received of Winthrop Trust Company One Thousand Dollars which amount please charge to account of

H. W. Crockford.

Check for counter use only.

Stamped: Certified Good for $1,000.00/100 when properly endorsed 7/24/20 Winthrop Trust Co. By Richard Rountree.

[On back:] H. W. Crockford. Pay to the order of any bank or banker. Prior endorsements guaranteed. July 26, 1920. Hanover Trust Co., Boston, Mass. Pay to the order of the Federal Reserve Bank of Boston. Prior endorsements guaranteed. Fourth-Atlantic Nat'l Bank, Boston. By W. N. Homer, Cashier. Jul. 27, 1920. Pay to the order of any Bank or Trust Company. Prior endorsements guaranteed. 5-12 Federal Reserve Bank of Boston 5-12.

EVIDENCE: PLAINTIFFS' EXHIBIT 15

1263, Eq., & Other Cases

No. 29266.

Boston, Mass., Jul. 24, 1920.

The Securities Exchange Company

For, and in consideration of the sum of Exactly Sixteen Hundred Dollars Exactly Dollars, receipt of which is hereby acknowledged, agrees to pay to the order of Patrick W. Horan upon presentation of this voucher at ninety days from date, the sum of Exactly Twenty-Four Hundred Dollars Exactly Dollars, at the Company's office, 27 School Street, Room 227 or at any Bank.

$2,400.00.

The Securities Exchange Company, Per
Chas. Ponzi. J. M.

[On back:] Patrick W. Horan. Received Payment Aug. 3-1920. Entered C. F. R. & Co. Internal Revenue stamp cancelled—50 cents.

126 EVIDENCE: PLAINTIFFS' EXHIBIT 16

1263, Eq., & Other Cases

Boston, Mass., Aug. 4, '20. No. 3820.

Hanover Trust Company, 5-161

Pay to the order of P. W. Horan $1,600.00 Exactly Sixteen Hundred Dollars Exactly Dollars.

Securities Exchange Co. Angeline R. Lacarno, Trustee.

Main Office, 268 Washington Street.
Branch Office, 222 Hanover Street.

Stamped: Good when properly endorsed. Payable only through Boston Clearing House, Aug. 4, 1920. Hanover Trust Company, C. A. Ganaghan, Treasurer.

[On back:] P. W. Horan. Patrick W. Horan. Pay to the order of the Merchants National Bank. Prior endorsement guaranteed. Peoples National Bank. D. E. Beard, Cashier. Aug. 5, 1920. Received Payment Through the Boston Clearing House. Merchants National Bank. F. C. Waite, Cashier.

EVIDENCE: PLAINTIFFS' EXHIBIT 17

1263, Eq., & Other Cases

No. 14963. Boston, Mass., Jul. 22, '20.

The Securities Exchange Company

for, and in consideration of the sum of Only Six Hundred Dollars Only Dollars, receipt of which is hereby acknowledged, agrees to pay to the order of Frank W. Murphy upon presentation of this voucher at ninety days from date, the sum of Only Nine Hundred Dollars Only Dollars, at the Company's office, 27 School Street, Room 227, or at any Bank.

$900.

The Securities Exchange Company, Per Chas. Ponzi. J. D.

127 [On back:] Frank W. Murphy. Received Payment Aug. 4, 1920. Entered C. F. R. & Co. Internal Revenue stamp cancelled—18 cents.

EVIDENCE: PLAINTIFFS' EXHIBIT 18

1263, Eq., & Other Cases

Boston, Mass., Aug. 4, '20. No. 4315.

Hanover Trust Company, 5-161

r to the order of Frank W. Murphy $600.00—Six Hundred Dol-s—Dollars.

Securities Exchange Co. Angeline R. Locarno, Trustee.

Main Office, 268 Washington Street.
Branch Office, 222 Hanover Street.

[On back:] Frank W. Murphy.

EVIDENCE: PLAINTIFFS' EXHIBIT 19

1263, Eq., & Other Cases

No. 25686. Boston, Mass., Jul. 24, '20.

The Securities Exchange Company

and in consideration of the sum of Only Five Hundred Dollars, ipt of which is hereby acknowledged, agrees to pay to the order Thos. Powers upon presentation of this voucher at ninety days n date, the sum of Only Seven Hundred Fifty Dollars Only Dol- at the Company's office, 27 School Street, Room 227 or at any k.

$750.00. The Securities Exchange Company, Per Chas. Ponzi. A. E. R.

[On back:] Thos. Powers. Chas. Cinecco. Received Payment Aug. 4, 1920. Entered C. F. R. & Co. Internal Revestamps cancelled—16 cents.

EVIDENCE: PLAINTIFFS' EXHIBIT 20

1263, Eq., & Other cases

Boston, Mass., Aug. 3, '20. No. 3776.

Hanover Trust Company, 5-161

to the order of Thos. Powers $500 00/100 Exactly Five Hundred rs Exactly Dollars.

Securities Exchange Co. Angeline R. Locarno, Trustee.

in Office, 268 Washington Street.
nch Office, 222 Hanover Street.

Stamped: Good when Properly Endorsed. Payable only through Boston Clearing House. Aug. 3, 1920. Hanover Trust Company. James E. Fanall, Vice Pres.

[On back:] Thos. Powers. For deposit only to the credit of the Department of Public Works. Registry of Motor Vehicles. Received Payment through the Boston Clearing House. Prior endorsements guaranteed. Aug. 6, 1920. Old Colony Trust Co. L. D. Seaver, Cashier.

(Here follows Plaintiffs' Exhibit 24, marked side folio pages 129 and 130.)

Account Conti, Pio.

		Deposits.	Withdrawals.	Balance.	D
		334,726 69	.....	334,726 69	..
July	19.....	193,296 79	101,500 00	426,523 48	...
	20.....	273,713 18	18,513 22	681,723 44	...
	21.....	273,802 98	1,869 24	953,657 18	...
	22.....	85,847 66	502,000 00	537,504 84	200
	23.....	270,992 92	1,452 04	807,045 72	...
	24.....	.....	5,000 00	802,045 72	...
	26.....	128,458 76	427,350 00	503,154 48	455
	27.....	95,793 46	117,466 80	481,481 14	437
	28.....	300,000 —	591,710 00	189,771 14	554
	29.....	.....	69,197 50	120,573 64	460
	30.....	.....	12,170 00	108,403 64	...
	31.....	.....	33,080 00	75,323 64	23
Aug.	2.....	.....	3,933 80	71,389 84	...
	3.....	600	1,850	70,139 84	...
	4.....	.....	70,139 84	0 —	...
	5.....	.....	.....	.....	...
	6.....	.....	.....	.....	...
	7.....	.....	.....	.....	...
	9.....	.....	.....	.....	..
	10.....	.....	.....	.....	...
	11.....	.....	.....	.....	..
		1,957,232 44	1,957,232 44	.....	2,160

*In red ink in original.

Accounts of Conti, Pio, Securities Exchange Co., and Martelli, I

	Account of securities exchange.			Account
	Deposits.	Withdrawals.	Balance.	Deposits.
69	.....	.....	.....	.....
48	.....	.....	.....	.....
44	.....	.....	.....	.....
18	.....	.....	.....	.....
84	200,000 00	1,350 00	198,650 00	.....
72	.....	71,665 30	126,984 70	.....
72	.....	57,284 94	69,699 76	.....
48	455,850 70	144,748 77	380,801 69	.....
14	467,748 33	170,706 15	677,843 87	.....
14	554,195 75	314,009 10	918,030 52	.....
64	460,058 63	439,037 66	939,051 49	.....
64	.....	392,957 25	546,094 24	.....
64	23,072 50	135,434 35	433,732 39	.....
84	.....	383,685 72	50,046 67	.....
84	.....	50,046 67	0	490,046 67
—	.....	.....	.....	658,680 00
...	.....	.....	.....	351,296 70
...	.....	.....	.....	543,709 00
...	.....	.....	.....	136,182 24
...	.....	.....	.....	31,471 11
...	.....	.....	.....	480,693 08
...	.....	.....	.....	9,300 00
...	2,160,925 91	2,160,925 91	.....	2,701,378 80

trustee.	Combined.		
Balance.	Deposits.	Withdrawals.	Balance.
.....	334,726 69	.....	334,726 69
.....	193,296 79	101,500 —	426,523 48
.....	273,713 18	18,513 22	681,723 44
.....	273,802 98	1,869 24	953,657 18
.....	285,847 66	503,350 —	736,154 84
.....	270,992 92	73,117 34	934,030 42
.....	.....	62,284 94	871,745 48
.....	584,309 46	572,098 77	883,956 17
.....	563,541 79	288,172 95	1,159,325 01
.....	554,195 75	905,719 10	1,107,801 66
.....	760,058 63	508,235 16	1,059,625 13
.....	.....	405,127 25	654,497 88
.....	23,072 50	168,514 35	509,056 03
.....	.....	387,619 52	121,436 51
49,974 17*	440,600 —	541,870 84	20,165 67
313,737 08	658,680 —	295,172 47	313,737 08
140,448 74	281,360 58	524,585 04	140,448 74
434,158 42	543,709 —	249,999 32	434,158 42
13,391 32	136,182 24	556,949 34	13,391 32
331,878 07*	31,471 11	376,740 50	331,878 07*
2,534 98*	480,693 08	151,349 99	2,534 98*
6,765 02	9,300	.....	6,765 02
6,765 02	6,699,554 36	6,692,789 34	6,765 02

1263, Eq., and Other Cases

Hanover Trust Company

Consolidation of All the Charles Ponzi Accounts

Deposits

	Less transfers.	Transfers.	Total.	Withdrawals.	Balance.
1920	334,726 69	.....	$334,726 69	.....	$334,726 69
July 19	193,296 79	.....	193,296 79	$101,500 —	426,523 48
20	273,713 18	.....	273,713 18	18,513 22	681,723 44
21	273,802 98	.....	273,802 98	1,869 24	953,657 18
22	285,847 66	.....	285,847 66	503,350 —	736,154 84
23	270,992 92	.....	270,992 92	73,117 34	954,030 42
24	100,000 —*	100,000 —	.....	62,284 94	871,745 48
26	528,458 76	55,850 70	584,309 46	572,098 77	883,956 17
27	563,541 79	.....	563,541 79	288,172 95	1,159,325 01
28	254,195 75	300,000 —	554,195 75	905,719 10	1,107,801 66
29	760,058 63	.....	760,058 63	508,235 16	1,059,625 13

Consolidation of All the Charles Ponzi Accounts.—Continued.

	Less transfers.	Transfers.	Total.	Withdrawals.	Balance.
30	.....	.....	.....	405,127 25	654,497 88
31	23,072 50	.....	23,072 50	168,514 35	509,056 63
Aug. 2	.....	.....	.....	387,619 52	121,436 51
3	40,600 —	400,000 —	440,600 —	541,870 84	20,165 67
4	359,080 —	299,600 —	658,680 —	295,172 47	313,737 08
5	256,360 58	25,000 —	281,360 58	524,585 04	140,448 74
6	259,999 38	283,709 62	543,709 —	249,999 32	434,158 42
7	68,768 34*	204,950 58	136,182 24	556,949 34	13,391 32
9	31,471 11	.....	31,471 11	376,740 50	331,878 07*
10	471,393 08	9,300 —	480,693 08	151,349 99	2,534 98*
11	9,300 —	.....	9,300 —	.....	6,765 02
	$5,021,143 46	$1,678,410 90	$6,699,554 36	$6,692,789 34	$6,765 02

*In red ink in original. These red figures are deductions for some reason.

Analysis of Deposits in Hanover Trust Company as Shown on Exhibit 25, Superseding Figures Given in Exhibit 25, First Two Columns, on and After July 27, 1920

July 27, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$563,541.79
Accounted for as follows:		
By deposits of investors' checks as shown on deposits slips	$367,746.98	
By transfer from Lexington Tr. Co.	100,000	
By credit to correct errors	1.35	
By deposits for which no slips are found, presumably investors' checks	95,793.46	
		563,541.79

July 28, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$554,195.75
Accounted for as follows:		
By deposits of investors' checks as shown on deposit slips	$54,195.75	
By deposit of check which was charged against Charles Ponzi's Pio Conti account and credited to Chas. Ponzi's Securities Exchange Co. account, both in Hanover Trust Co.	500,000	
		554,195.75

133 July 29, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$760,058.63
Accounted for as follows:		
By deposits of investors' checks as shown on deposit slips	$460,058.63	
By transfers as follows:		
From Lawrence Tr. Co. $100,000		
" Manchester bank 200,000		
	300,000	
		760,058.63

July 31, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$23,072.50
Accounted for as follows:		
By deposits of investors' checks as shown on deposit slips	$22,872.50	
By credit for check certified, probably in error	200	
		23,072.50

August 3, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$440,600
Accounted for as follows:		
By transfers as follows:		
From Lawrence bank $150,000		
" Manchester " 50,000		
	$200,000	
By credit for proceeds of the following notes discontinued:		
Lucy Meli 80,000		
134 Henry Dackiewitz 80,000		
George Mirski 80,000		
	240,000	
By deposits for which no slips are found	600	
		440,600

August 4, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$658,680
Accounted for as follows:		
By deposits of investors' checks as shown on deposit slip	$8,080	
By transfers from various banks, principally outside of Boston	449,600	
By credit to correct error	1,000	
By deposit for which no slip is found, but probably represented by an item of a like amount which is charged against Charles Ponzi's Pio Conti account on July 26, 1920, the proceeds of which are not otherwise accounted for	200,000	
		658,680

August 5, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$281,360.58
Accounted for as follows:		
By transfers:		
From Lexington bank	$25,000	
" Manchester "	200,000	
" Quincy "	9,900	
	$234,900	
By deposit of check drawn on Hanover Trust Co., which probably represents proceeds of sale of securities accepted as payment for note issued to an investor	18,000	
35		
By credit for check on Natl. Shawmut Bank, which was credited to the account of the Hanover Tr. Co. at the 4th Atlantic Natl. Bank and subsequently credited to Charles Ponzi's Lucy Martelli account, the source of which is at this time not known	28,460.58	
		281,360.58

August 6, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25		$543,709.00
Accounted for as follows:		
By transfers:		
From Tremont Trust Co	$185,000	
" Lexington bank	5,000	
" Cosmopolitan Trust Co	278,709	
" Manchester bank	75,000	
		543,709.00

August 7, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibits 25	$136,182.24

Accounted for as follows:

By transfer:

From Merchants Natl. Bank, Boston..	$14,282.24	
By credit to correct error.....	9,900	
By deposit for which no slip is found, probably transfer from Lawrence bank represented by check drawn Aug. 3rd	100,000	
By credit which probably represents proceeds of sale of Fidelity Trust Co. stock	6,000	
By deposit of cash as shown on deposit slip, the source of which is not known	6,000	
		136,182.24

136 August 9, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25..... $31,471.11

Accounted for as follows:

By deposits of investors' checks as shown on deposit slip.....	$958	
By transfer from First State Bank, Boston	6,871.50	
By credit for release of accounts trusteed	18,813.39	
By deposit of check drawn on Hanover Trust Co., probably transfer between the Charles Ponzi accounts.....	1,440.62	
By deposit or credit for which no slip is found	3,387.60	
		31,471.11

August 10, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibits 25..... $480,693.08

Accounted for as follows:

By deposits of investors' checks as shown on deposit slip	$7,440	
By credit from certificate of deposit transaction	441,778.07	
By credits to correct errors as shown on deposit slips.....	1,525.01	
By transfer from Quincy bank.....	9,300	
By deposits or credits for which no slips are found.....	17,650	
By deposits as shown on deposit slip, the source of which is not known..	3,000	
		480,693.08

137 August 11, 1920

Total deposits to be accounted for as shown in Column 3 of Exhibit 25..... $9,300

Accounted for as follows:

By deposit or credit for which no slip is found, presumably a redeposit of the item shown as a transfer from Quincy bank on August 10, 1920..... 9,300

EXHIBIT 26*a*

1263, Eq., & Other Cases

[On margin:] Certificate of Deposit. Boston, Aug. 30, 1920. F. N. R. L. P. E. N. P. Charges 20c.

Boston, Mass., July 22, 1920. No. 138.

Hanover Trust Company 5-161

This is to certify that there has been deposited with this company Fifty-Eight Thousand Two Hundred Tweny-One Dollars 58,221 93/100 Dollars Ninety-Three Cents.

Payable to Charles Ponzi or order upon surrender of this certificate properly endorsed. Time Deposit.

—— ——, President. Charles A. Ganaghan, Assistant Treasurer.

[On back:] Chas. Ponzi. Deposit account of John F. Perkins William R. Sears Edward A. Thurston Receivers of Charles Ponzi.

138 EVIDENCE: EXHIBIT 27

1263, Eq., & Other Cases

[On margin:] Certificate of Deposit. Boston, Aug. 30, 1920. P. N. P. L. P. E. N. P. Charges 204.

(Copy)

Hanover Trust Company 5-161 1

Boston, Mass., July 22, 1920. No. 136. 2

This is to certify that there has been deposited with this company Five Hundred Thousand Dollars $500,000.00/100 payable to Charles Ponzi or order upon surrender of this certificate properly endorsed. Time Deposit Thirty days after notice is given in writing. 6 6

William S. McNary, Treasurer. Charles A. Ganaghan, Assistant Treasurer.

[On back:] Chas. Ponzi. Deposit to account of John F. Perkins William R. Sears Edward A. Thurston, Receivers of Charles Ponzi.

EVIDENCE: PLAINTIFF'S EXHIBIT 28

1263, Eq., & Other Cases

[On margin:] Certificate of Deposit. Boston, Aug. 30, 1920. L. P. E. P. N. P. N. P. Charges 204.

Hanover Trust Company 5-161 1

Boston, Mass., July 22, 1920. No. 137. 2

This is to certify that there has been deposited with this com- 6
pany Five Hundred Thousand Dollars *Dollars* $500,- 5
139 000.00 Payable to Charles Ponzi or order upon surrender of this certificate properly endorsed. Time Deposit thirty days after notice is given in writing.

William S. McNary, Treasurer. Chares A. Ganaghan, Assistant Treasurer.

[On back:] Chas. Ponzi. Deposit to account of John F. Perkins William R. Sears, Edward A. Thurston, Receivers of Charles Ponzi.

EVIDENCE: EXHIBIT 29

1263, Eq., & Other Cases

[On margin:] Time Certificate of Deposit.

(Copy)

Hanover Trust Company 5-161

Boston, Mass., July 22, 1920. No. 133.

This is to certify that there has been deposited with this company One Million Five Hundred Thousand Dollars $1,500,000. Payable to Chas. Ponzi or order upon surrender of this certificate properly endorsed thirty days after notice is given in writing. 4½%.

Henry H. Chmielinski, President. William S. McNary, Treasurer.

[On back:] Chas. Ponzi. Hanover Trust Co., Aug. 10-20. Paying Teller.

140 EVIDENCE: EXHIBIT 30

1263, Eq., & Other Cases

EDWARD C. MACK, JR.,
CHARLES C. GAMMONS,
Associate Counsel.
Estate of CHARLES PONZI.

30 STATE STREET,
BOSTON, MASS.
Room 708.
Telephone Main 7515.

DEAR —— ——:

The United — District Court for the District of Massachusetts has decided that preferences paid to note holders by Charles Ponzi are recoverable by the trustees of the Ponzi Estate.

In behalf of the trustees I have been instructed to collect a preference paid you in the sum of $— and by making settlement at the office at once you will avoid great inconvenience and expense.

Yours very truly, —— ——.

EVIDENCE: EXHIBIT 31

1263, Eq., & Other Cases

EDWARD C. MACK, JR.,
CHARLES C. GAMMONS,
Associate Counsel.
Estate of CHARLES PONZI.

30 STATE STREET,
BOSTON, MASS.
Room 708.
Telephone Main 7515.

DEAR —— ——:

Since you have neglected to make any reply to our letter requesting settlement of the preference paid you by Charles Ponzi, we shall be obliged to recommend your name for suit to the Trustees of the Charles Ponzi Estate unless we hear from you immediately.

Very truly yours, —— ——.

141 United States Circuit Court of Appeals for the First Circuit,
October Term, 1922

No. 1562

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

BENJAMIN BROWN, Defendant, Appellee.

No. 1563

SAME

v.

H. W. CROCKFORD.

No. 1564

SAME

v.

H. P. HOLBROOK.

No. 1565

SAME

v.

PATRICK W. HORAN.

No. 1566

SAME

v.

FRANK W. MURPHY.

No. 1567

SAME

v.

THOMAS POWERS.

Appeals from the District Court of the United States for the District of Massachusetts

Before Bingham, Johnson, and Morriss, JJ.

OPINION OF THE COURT

[November 13, 1922]

MORRIS, *J.*: These six suits in equity were brought by the plaintiffs, who are the trustees in bankruptcy of one Charles Ponzi, to recover of the defendants sums paid them by the bankrupt within four months prior to the filing of the petition in bankruptcy,
142 which payments the plaintiffs allege constitute unlawful preferences. The actions were tried together in the District Court and argued together in this Court.

The transactions involved are simple. Each defendant turned over to the bankrupt a sum of money as an investment. Shortly thereafter all became satisfied that Ponzi was engaged in a fraudulent scheme, whereupon they demanded the return of their money. Each received back a check for the exact sum invested without interest or costs. It is the return of these sums by the bankrupt to the

defendants that the plaintiffs now allege constitute unlawful preferences and which they seek to recover.

The following tabulation shows the amount and date of investment and date of the return check:

Name.	Amount.	Dates paid.	Dates of return check.
Benjamin Brown	$600.	July 20/20	Aug. 2/20
" "	600.	" 24/20	" 2/20
H. W. Crockford	1000.	" 24/20	" 2/20
H. P. Holbrook	1000.	" 22/20	" 4/20
Patrick W. Horan	1600.	" 24/20	" 4/20
Frank W. Murphy	600.	" 22/20	" 4/20
Thomas Powers	500.	" 24/20	" 3/20

The right of the plaintiffs to proceed on the equity side of the court has not been questioned, and we treat any objections to the form of the actions that might have been raised as waived.

Warmath v. O'Daniel, 159 Fed. 87, 91.
Gooch v. Stone, 257 Fed. 631, 634.
Rosenthal v. Heller, 266 Fed. 563.

A creditor's petition in bankruptcy was filed in the District Court for the District of Massachusetts against Charles Ponzi on the ninth day of August, 1920; he was adjudged a bankrupt on the twenty-fifth day of October, 1920; and the plaintiffs are trustees of his estate.

Charles Ponzi, as a financier, had a meteoric career lasting from December, 1919, to August 9, 1920.

143 He did business under the name of "Securities Exchange Company." The record shows that, starting with a capital of one hundred fifty dollars ($150.00), he owed, when he was petitioned into bankruptcy, outstanding unsecured notes amounting to four million two hundred sixty-three thousand six hundred fifty-two dollars, fourteen cents ($4,263,652.14), on a basis of the money invested with him. He represented to the public that he was engaged in the business of buying and selling international reply postal coupons, and dealing in foreign exchange, from which he realized enormous profits that he was willing to share with those who were willing to invest their money with him.

His scheme consisted of selling his own notes or obligations, by the terms of which he promised to pay the amount invested with fifty per cent (50%) addition in ninety days, but as a matter of practice, in most instances, he returned the principal with fifty per cent (50%) addition in forty-five days. The total amount of notes issued between December, 1919, and July 26, 1920, investment value, was nine million five hundred eighty-two thousand five hundred ninety-one dollars, eighty-two cents ($9,582,591.82), and on the basis of his promise to pay, fourteen million three hundred seventy-four thousand seven hundred fifty-five dollars, fifty-nine cents ($14,374,755.59).

His transactions became a matter of public investigation the last

of July, 1920. He stopped receiving money July 26, 1920. The investigation disclosed that he was receiving money from new investors with which he paid the notes and interest of earlier investors. As his receipts rapidly increased all the time, it was easy for him to meet his maturing obligations even before they became due. He made no substantial investments from which he derived a profit, but deposited the money in banks as fast as he received it, from which he checked it out to pay maturing notes. He was so well advertised by the recipients of early profits, that his fame as a financier spread rapidly, and by the middle of July, 1920, his operations had extended over most of New England and beyond, with branch offices in many cities and with weekly receipts approximating one million dollars.

144 His scheme was a gigantic fraud from start to finish. As he was paying ten and fifteen per cent to his agents and maintaining an office force, in addition to the enormous rate of interest paid, it is apparent that he was insolvent from the start, and became more so with each note issued.

While the six cases tried differ in some respects, in the main they are alike in that they are all technical preference suits brought to recover money from Ponzi investors, who, upon discovering the fraud prepetrated on them, were fortunate enough to present their notes for cancellation and receive back the amounts invested, without diminution and without interest additions. Therefore, the main issues in the several cases are alike, and permit the consideration of them as a single case.

The defendants' transactions were with the Boston office, and, as they received back only so much as they paid in, it cannot be said that their transactions added to or depleted the bankrupt's estate that he otherwise would have had. It is a well settled principle of bankruptcy law that there can be no preferential transfer without a depletion of the bankrupt's estate, and unless it can be shown that the defendants' money became so commingled with the money of the bankrupt as not to be distinguishable from it, property in it never passed out of the defendants to the bankrupt. Had it been goods that the defendants had turned over to the bankrupt; and they had received the same goods back, the case would present no serious difficulties.

People's National Bank v. Mulholland, 228 Mass. 152.
In re Gold, 210 Fed. 410.
In re Hamilton Furniture & Carpet Co., 117 Fed. 774.
Illinois Parlor Frame Co. v. Goldman, 257 Fed. 300.

Are the defendants to be barred from retaining what was and is their own, because the transactions involved money or checks instead of goods? Looking at the matter from a purely equitable viewpoint, as between the bankrupt and the parties defrauded, the rights of the latter ought to be the same whether the transactions involved goods or money. If the equities are equal, in the interest of
145 justice, it is the duty of the court to uphold the right of rescission unless it contravenes some binding principle of law.

Unless superior rights of third parties have intervened, the defendants ought to be permitted to retain their money.

It is found as a fact that all the money paid the bankrupt by the defendants was deposited by him not later than the day succeeding payment, in the Hanover Trust Company. It is also found that the sums paid in were repaid on the dates set forth in the above tabulation, by checks drawn on the Hanover Trust Company. At no time between July 20 and August 4, 1920, was the bankrupt's deposit in said bank less than the aggregate amount of defendants' claims. There were deposits and withdrawals by the bankrupt on his account in the intervening time, but the presumption is, where trust money, or money charged with a trust ex maleficio, is commingled with the general funds of the debtor, and payments are made therefrom, that the debtor first exhausts his own, before paying out the trust funds.

Importers' and Traders' National Bank v. Peters, 123 N. Y. 272.

Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567.

Smith v. Mottley, 150 Fed. 266.

Hewitt v. Hayes, 205 Mass. 356.

In the case of Frelinghuysen v. Nugent, 36 Fed. 229, 239, the rule relative to establishing a trust ex maleficio in the proceeds of money fraudulently obtained or converted, is stated by Mr. Justice Bradley as follows:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it
146 into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

The language above quoted is cited with approval in the following cases:

Peters v. Bain, 133 U. S. 670, 693.

Boone County National Bank v. Latimer, 67 Fed. 27.

Standard Oil Co. of Ky. v. Hawkins, 74 Fed. 395, 401.

Metropolitan National Bank v. Campbell Commission Co., 77 Fed. 705.

Beard v. Independent Dist. of Pella City, 88 Fed. 375.

Terre Haute & I. R. Co. v. Cox, 102 Fed. 825, 836.

American Can Co. v. Williams, 176 Fed. 816.

In re Stewart, 178 Fed. 463, 472.

The modern doctrine follows the principle announced in In re Hallett's Estate (Knatchbull v. Hallett), 13 Ch. Div. 696, which holds in effect that, if money held by one in a fiduciary character has been paid by him to his account at his bank, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and that, if the depositor has commingled it with his own funds in the bank, and afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that if he destroyed the trust fund by dissipating it altogether, there remains nothing to be the subject of the trust; that only so long as the trust property can be traced and followed into other property into which it has been converted, does it remain subject to the trust.

In First National Bank v. Armstrong, 36 Fed. 59, 61, Judge Jackson says:

"The old idea that because money has no ear-marks it cannot be followed when mingled with the funds of a wrong-doer, has long since been exploded. The decisions in England and in this country now allow a trust fund to be followed as long as it can be traced, and its identity ascertained, whether in its original or in some substituted form."

147 In the case of National Bank v. Insurance Company, 104 U. S. 54, it is held that, as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property.

In the case of In re Royea's Estate, 143 Fed. 182, it is held that, where petitioner intrusted certain money to the bankrupt for safe keeping only, and he deposited it to the credit of his general bank account, which at all times exceeded the amount so intrusted to him and it came into the hands of his trustee in bankruptcy, plaintiff was entitled to enforce a preferred claim on such bank balance in the hands of the trustee, though the actual money delivered to the bankrupt could not be identified.

In the case of Board of Commissioners v. Strawn, 157 Fed. 49, 51, Judge Burton says:

"It is, therefore, a part of the rule applicable to following misappropriated moneys into a bank account that, if at any time during currency of the mingled account the drawings out had left a balance less than the trust money, the trust money must be regarded as dissipated except as to the balance, the sums subsequently added to the account from other sources not being attributed to the trust fund."

In the case of Empire State Surety Company v. Carroll County, 194 Fed. 593, 605, Judge Sanborn says:

"Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling * * * as trust property, because the legal presumption is, that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred."

148 See also,

Board of Commissioners v. Patterson, 149 Fed. 229.
In re M. E. Dunn & Company, 193 Fed. 212.
Watchmaker v. Barnes, 259 Fed. 783.

The authorities appear to draw a distinction between cases wherein the proof shows the trust property went into the general estate of the bankrupt, and those in which the trust property is followed into some specific fund. In the first mentioned class, recovery of the trust fund, as such, is usually denied, although numerous cases may be found appearing to extend the equitable principle of recovery of trust funds that far.

Lucas County v. Jamison, 170 Fed. 338.
Western German Bank v. Norvell, 134 Fed. 724.
Richardson v. New Orleans Coffee Co., 102 Fed. 785.
Smith v. Township of Au Gres, Mich., 150 Fed. 257.

It appears to us that the weight of authority limits recovery to the second class, and we hold that it is indispensable to the maintenance by a cestui que trust of a claim to a preferential payment out of the proceeds of a bankrupt estate that proof be made that trust property or its proceeds went into a specific fund. It is not sufficient to prove that the trust property, or its proceeds, went into the general assets of the insolvent estate.

In re Mulligan, 116 Fed. 715.
Peters v. Bain, 133 U. S. 670.
Zenor v. McFarlin, 238 Fed. 721.
Lowe v. Jones, 192 Mass. 94.
Bank Commissioners v. Trust Co., 70 N. H. 536, 548.

Proof that defendants' money was deposited in the Hanover Trust Company, and that at no time between the dates of deposit and the dates of rescission and withdrawal was the bankrupt's account depleted to a sum less than the aggregate amount of defendants' claims, is considered by us as sufficient proof that defendants' money remained in the specific fund within the principles stated in the authorities cited.

149 Empire State Surety Co. v. Carroll County, 194 Fed. 593.
In re A. Bolognesi & Co., 254 Fed. 770.
Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567.

The facts in the cases at bar differ in one material respect from those cited, although the same principles are involved. In the present cases the parties defrauded are not seeking to follow their money into the hands of the trustees. The process is reversed. The trustees are seeking to show that the money received by the defrauded persons belongs to the general estate of the bankrupt. Clearly the burden of proof is upon the trustees. When it appears, as it does, that the defendants upon discovering the fraud, went to the bankrupt, surrendered their notes, demanded the return of their money and received checks drawn upon a specific fund in the same bank is which their money had been deposited a few days before, we cannot say that they got money belonging to the bankrupt and not their own, or proceeds of their own, within the meaning of the equitable principle of law permitting the following and recovery of trust funds.

The terse statement of Mr. Justice Day in the case of Gorman v. Littlefield, 229 U. S. 19, 25, to the effect that no creditor of the bankrupt can demand that the estate of the bankrupt be augmented by the wrongful conversion of property of another, or the application to the general estate of property which never rightfully belonged to the bankrupt, is in point.

We do not understand that our decision is contrary to the principles laid down by the Supreme Court in the case of National City Bank v. Hotchkiss, 231 U. S. 50, relied on by the plaintiffs. In that case no question of fraud was involved. What is said by Mr. Justice Holmes at pages 57, 58 of the opinion is sufficient to distinguish the facts in that case from those in the case at bar. He says:

"It is not like the case of property wrongfully mingled with general funds and afterwards traced. All that the parties agreed either expressly or by implication was that the debt incurred at ten o'clock should be paid by three * * * The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many general creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back. Time sometimes can be disregarded when it is insignificant. But in this case half the time between the loan and the transfer of securities sufficed to change the position of the borrowers from a fortune of half a million to a deficit of double that amount."

If the issues in this case were not complicated by the fact that all the money in the Hanover Trust Company was money received by Ponzi as a result of his fraud, it would be unnecessary to prolong this discussion.

The plaintiffs call attention to the rule in Clayton's case, 1 Mer. 572, claiming it governs these cases. By this rule withdrawals from a fund belonging in equity to several persons, and insufficient to satisfy their claims in full, are charged against deposits to the fund in the order of the receipts of these deposits. Claimants share in the fund in the inverse order in which their moneys went into it.

The true application of the rule in Clayton's case is pointed out in Re Hallett's Estate, 13 Ch. Div. 696. It is there held that, if a person who holds money as a trustee or in a fiduciary character, pays it to his account at the bankers, and mixes it with his own money and afterwards draws out sums by checks in the ordinary manner that the rule in Clayton's case, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.

But if the fund into which trust moneys have been paid is insufficient in amount to satisfy all beneficiaries, then it is held (Frye, J.) that as between two cestuis que trust whose money the trustee has paid into his own account at his banker's, the rule in Clayton's case applies so that the first sum paid in will be held to have been the first drawn out.

It does not appear that the money in the Hanover Trust Company was ever depleted to a sum insufficient to pay all of Ponzi's
151 victims who sought rescission from that fund. The rule of Clayton's case is not applicable.

Ponzi had a defeasible title to the money he received from his victims. (Donaldson, Assignee, v. Farwell et al., 93 U. S. 631.) One who has been induced to part with his goods or money through fraud has an election of remedies; he may rescind the transaction and recover his property, in which case title never becomes absolute in the vendee; or he may affirm the transaction and bring an action for damages, in which case the defeasible title of the vendee becomes absolute.

Ponzi's victims may be divided into two classes: those who became convinced that he was an imposter engaged in a fraudulent scheme and who rescinded their transactions and received back what they paid in; and those who for the sake of a large profit risked their money with him until it was too late to get it back. The defendants are typical of the first class. The creditors represented by the trustees include the second class. The second class having played the game and lost, the trustees are now seeking contribution in their behalf and that of other creditors, from the less daring but more fortunate first class.

If there are some investors who from one cause or another were not able to present their notes in time to get their money back, their special rights are not represented by the plaintiffs. Those who could get their money back and didn't knowing as they must from the time the MacMaster's expose was published August 2, that Ponzi was an impostor, affirmed their investments and are not entitled to rescind. Their money became a part of the bankrupt's general estate.

The transactions here involved all occurred between July 20 and August 4, inclusive. On July 26 Ponzi stopped receiving money from investors.

The total amount of money in Ponzi's account at the Hanover Trust Company during the period covered by these transactions was

five million two hundred sixteen thousand eight hundred thirty-eight dollars, thirty-five cents ($5,216,838.35), made up as follows:

152	Amount in bank morning July 19	$334,726.69
	Received from victims	3,726,660.96
Transferred from other banks or accounts		1,165,450.70
	Total	$5,216,838.35
Withdrawals during period		4,833,165.15
	Balance at close of business August 4	$383,673.20

His deposits, not listed as transfers from other banks, continued beyond July 26, the date when he stopped receiving money. Between July 27 and August 4, he deposited three million one hundred fifty-four thousand nine hundred ninety-nine dollars, thirty-seven cents ($3,154,999.37), of which, one million one hundred fifty-five thousand four hundred fifty dollars, seventy cents ($1,155,450.70) was transferred from other banks.

This leaves one million nine hundred ninety-nine thousand five hundred forty-eight dollars, sixty-seven cents ($1,999,548.67) received from investors or before July 26 and that had not been deposited at the close of business on July 26. The record is silent as to the classes of victims from which these deposits were received, or the amount received from each class. There were only two days, August 2 and August 3, when the balance in the account was less than the amount on deposit at the opening of business July 19. His smallest balance at the close of business any day was August 3, when the account was drawn down to twenty thousand one hundred sixty-five dollars, sixty-seven cents ($20,165.67).

During the intervening time a "run" was in progress, and his Boston office was besieged by his victims clamoring, some for the return of their money, others for the payment of their matured notes.

The computations we have made are useful only for the purpose of illustrating the impossibility of determining from the records either when or from what persons other than the defendants the deposits were received.

153 & 154 What is said of the receipts is true of the disbursements. The record shows that four million eight hundred thirty-three thousand one hundred sixty-five dollars, fifteen cents ($4,833,165.15) was paid out, but it does not disclose how much was paid on account of matured obligations, or how much was returned to victims asking the return of their money. From anything appearing in the record, all who invested between July 19 and August 4 may have received their money back, as much more was paid out than was received from investors during that period.

But why should we speculate? Conceding that all the money handled by Ponzi originally came from his victims, yet the money deposited between July 19 and August 4 was no doubt a mixed

account made up of money received from those who held their notes until maturity, those who were willing to take a chance and hold on until their notes matured, and those who sought to rescind. The first two classes have lost their right to rescind and title to the money they invested was in the bankrupt. Absolute title to the money of those who rescinded as soon as they discovered the fraud never vested in the bankrupt. The defendants come within the last mentioned class.

Holding, as we do, that the burden of proof is upon the plaintiffs, we cannot say that the money of the defendants received was charged with a trust in favor of anyone else. As between the general creditors of the bankrupt who lost their right to rescind (National City Bank v. Hotchkiss, supra) and the defendants who did rescind, the former cannot demand that the estate of the bankrupt be augmented by the application to the general estate of property that never rightfully belonged to the bankrupt. (Gorman v. Littlefield, 229 U. S. 19.)

Our conclusions make it unnecessary to consider the additional question of infancy raised in the Brown case.

In each case the decree of the District Court is affirmed with costs to the appellee.

155 On June 6, 1922, these cases came on to be heard, and were fully heard by the court, Honorable George H. Bingham and Honorable Charles F. Johnson, Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit, on the thirteenth day of November, A. D. 1922, the opinion of the court (page 141) was announced and the following Final Decree was entered in each case:

In U. S. Circuit Court of Appeals

FINAL DECREE

[November 13, 1922]

This case came on to be heard June 6, 1922, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, November 13, 1922, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed with costs to the appellee.

By the Court,

Arthur I. Charron, Clerk.

Thereafter, to wit, on the second day of January, A. D. 1923, the following certified copy of Order of Court was filed:

ORDER OF DISTRICT COURT

[Filed January 3, 1923]

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts

In Bankruptcy

No. 28057

CHARLES PONZI

In re Resignation of James A. Lowell and William R. Sears as Trustees of the Estate of Charles Ponzi, Bankrupt

It is hereby ordered, adjudged and decreed that the resignation of the said Lowell and Sears respectively as Trustees of the Estate of the said Charles Ponzi, Bankrupt, be, and the same hereby are, accepted; and it is further ordered, adjudged and decreed that the remaining Trustee, Edward A. Thurston, shall continue in
156 office, and hereafter as sole Trustee shall perform the duties of that office.

By the Court, October 23, 1922.

Mary E. Prendergast, Deputy Clerk. J. M. M., Jr.

A true copy.
Attest:

Nellie C. Clifford, Secretary to Robert E. Goodwin, Referee, Notary Public. [Seal.] My commission expires September 29, 1928.

Thereafter, to wit, on the third day of January, A. D. 1923, the following Motion for Stay of Mandate was filed in each case:

In U. S. Circuit Court of Appeals

MOTION FOR STAY OF MANDATE

[Filed January 3, 1923]

Now comes the plaintiff, appellant, in the above-entitled causes and represents to this Honorable Court that he intends to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore he moves that the issue of the mandate in the above-entitled cases be stayed pending the determination by said Supreme

Court of his petition for said writ, or until the further order of this court.

By His Attorneys, William R. Sears, Stanley B. Hall. Dated December 21, 1922.

On the same day, to wit, on the third day of January, A. D. 1923, the following Order of Court was entered in each case:

In U. S. Circuit Court of Appeals

ORDER OF COURT STAYING MANDATE

[January 3, 1923]

Upon motion of Edward A. Thurston, Trustee, appellant, setting forth that he proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case
157 be, and the same hereby is, stayed until further order of this court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

Arthur I. Charron, Clerk.

In U. S. Circuit Court of Appeals

CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 157, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including January 5, 1923, in the causes in said court numbered and entitled, No. 1562, James A. Lowell et al., Trustees, Plaintiffs, Appellants, v. Benjamin Brown, Defendant, Appellee; No. 1563, Same v. H. W. Crockford; No. 1564, Same v. H. P. Holbrook; No. 1565, Same v. Patrick W. Horan; No. 1566, Same v. Frank W. Murphy; No. 1567, Same v. Thomas Powers.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this fifth day of January, A. D. 1923.

Arthur I. Charron, Clerk. (Seal of United States Circuit Court of Appeals, First Circuit.)

158 WRIT OF CERTIORARI AND RETURN

[Filed April 4, 1923]

UNITED STATES OF AMERICA, *ss:*

(Seal of the Supreme Court of the United States.)

The President of the of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which James A. Lowell et al., Trustees, are appellants, and Benjamin Brown is appellee, No. 1562, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
159 States Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

160 [File endorsement omitted.]

161 RETURN ON WRIT OF CERTIORARI

United States Circuit Court of Appeals for the First Circuit

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the causes in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this second day of April, A. D. 1923.

Arthur I. Charron, Clerk. (Seal of United States Circuit Court of Appeals, First Circuit.)

162 United States Circuit Court of Appeals for the First Circuit, October Term, 1921

No. 1562

JAMES A. LOWELL et al., Trustees, Plaintiffs, Appellants,

v.

BENJAMIN BROWN, Defendant, Appellee.

No. 1563

SAME

v.

H. W. CROCKFORD.

No. 1564

SAME

v.

H. P. HOLBROOK.

No. 1565

SAME

v.

PATRICK W. HORAN.

No. 1566

SAME

v.

FRANK W. MURPHY.

No. 1567

SAME

v.

THOMAS POWERS.

STIPULATION

In the above entitled cases it is stipulated that the record heretofore filed in the Supreme Court of the United States in support of

the petition for certiorari may be taken as a return to the writ of certiorari.

William R. Sears, Counsel for the Appellants. Louis Goldberg, Counsel for Benjamin Brown. Devine, York & Ellsworth, John H. Devine, Counsel for H. W. Crockford. J. P. Dexter, Counsel for H. P. Holbrook. Michael J. Horan, Counsel for Patrick Horan. Edward A. Counihan, Jr., Counsel for Frank W. Murphy. William H. Powers, Jr., Counsel for Thomas Powers.

A true copy.
Attest:

Arthur I. Charron, Clerk. (Seal of United States Circuit Court of Appeals, First Circuit.)

163 [File endorsement omitted.]

Supreme Court of the United States

October Term, 1923

No. 213

HENRY V. CUNNINGHAM, SUCCESSOR TO EDWARD A. THURSTON, TRUSTEE OF THE BANKRUPT ESTATE OF CHARLES PONZI,

PETITIONER

v.

BENJAMIN BROWN AND OTHERS

BRIEF FOR PETITIONER

EDWARD F. McCLENNEN
WILLIAM R. SEARS
CLARENCE M. GORDON

For Petitioner

January, 1924

CASES AND AUTHORITIES CITED

Supreme Court of the United States

OCTOBER TERM, 1923

No. 213

HENRY V. CUNNINGHAM, Successor to Edward A. Thurston, Trustee of the Bankrupt Estate of Charles Ponzi, Petitioner

v.

BENJAMIN BROWN and others

SUMMARY

THE ERROR CLAIMED

The District Court, and the Circuit Court of Appeals for a different reason, have decided that the defendants did not receive payment of an obligation from the bankrupt, but that they merely recaptured from him their own property. It is respectfully submitted that this was error.

STATEMENT OF FACTS

In 1921 the trustees in bankruptcy of Charles Ponzi, for the benefit of upwards of four thousand creditors who had proved claims of approximately $3,440,000 (R. 71) and had pending claims which might increase the amount to upwards of $4,200,000 (R. 53), brought these six suits to recover preferential payments made to the six defendants by Ponzi on August 2, 3, and 4, 1920, within ten days before the filing of the petition in bankruptcy against him. Many hundred suits and claims by the same trustees against as many other persons, who were paid millions of dollars at about the same time, depend on the principle to be determined by this court in this case.

Ponzi, in December, 1919, began, with a capital of $150, the business of borrowing money on his promissory notes payable ninety days after date for 150% of the amount which he borrowed. This business continued without interruption until just before the bankruptcy petition against him, filed in the District Court for the District of Massachusetts on August 9, 1920.

Ponzi did not purport to receive money for investment for account of the lender, or to undertake any trust obligation to the lender. He borrowed the money on his credit only. The lenders did not entrust the money to him. His fifteen thousand to twenty thou-

sand dupes were his only sources for money (R. 8, 14). The inducement to them was 50% in ninety days. To explain his financial ability to pay his notes and his willingness to pay such a high rate, he spread the false tale that he, on his own account, was engaged in the business of buying international postal coupons in one or more foreign countries and selling them in other countries at a 100% profit, rendered possible by the different rates of exchange produced by the after-war distortions. He furthered the prospective lenders' avidity by adopting the practice of paying his ninety-day notes at the end of forty-five days, at the full 150%, and of paying any notes presented at any time before forty-five days at 100% (R. 8, 69). Within the eight months he took in $9,582,591.82, for which he issued his promissory notes for $14,374,755.59 (R. 53). These were issued to many thousand small lenders. He paid his agents a commission of at least 10%. This, with the 50% to lenders, made every loan cost him at least 60%. He was always insolvent, and became daily more so the more his business succeeded (R. 53).

The dates in 1920, and the amounts of the loans by the defendants, and the dates when Ponzi paid the defendants off, were as follows:

Name	Date of Loan	Amount	Date of Payment
Benjamin Brown	July 20	$600	August 2
	24	600	August 2
H. W. Crockford	July 24	1,000	August 2
Patrick W. Horan	July 24	1,600	August 4
Frank W. Murphy	July 22	600	August 4
Thomas Powers	July 24	500	August 3
H. P. Holbrook	July 22	1,000	August 4
		$5,900	

By July Ponzi was receiving loans at the rate of upwards of $1,000,000 a week (R. 8, 13). The receipts were deposited in various banks in Boston and other cities, in which Ponzi had accounts in different names (R. 53). During July the remains of these deposits were transferred to the Hanover Trust Company in Boston (R. 14, 71), in which he had accounts in three names, namely, (1) Conti, Pio; (2) Securities Exchange; and (3) Martelli, Lucy, Trustee (Ex. 24, p. 92; Ex. 25, p. 93; R. 13).

The first loan involved in these cases was made July 20th, and the last on July 24th (R. 7). It does not appear what became of the loans of July 20th and 22d (R. 71). (Note an apparently inadvertent finding *contra* (R. 15), unsupported.) Those of July 24th were deposited in the Hanover Trust Company (R. 67).

At the opening of business on July 19, 1920, the balance of Ponzi's deposit accounts at the Hanover Trust Company was $334,726.69; at the close July 24th it was $871,745.48 (R. 13). This sum was exhausted by withdrawals of July 26th, $572,098.77; July 27th, $288,172.95; July 28th, $905,719.10 (R. 72, 93). But notwithstanding this exhaustion, the account continued to show a balance because new deposits put the balance up in fluctuating amounts, generally diminishing, until there was a large overdraft on August 9th. The total withdrawals from July 19th to August 10th were $6,692,789.34 (R. 13).

All the lenders, including the defendants, who were paid off in August, had more than reasonable

cause to believe that Ponzi was insolvent (R. 15, 16). This is the finding of fact by the court who heard and saw the witnesses, and is abundantly supported by the evidence (R. 62, 54-65). A like conclusion on even less evidence was reached in *Lowell* v. *Ashton*, 272 Fed. 536.

The sums so paid out in August exceeded $2,500,000 (R. 94).

As the recipients knew of the insolvency, they had reasonable cause to believe that the payments would work a preference.

The defendants and others in receiving the August payments were not rescinding their loans because they had evidence that the loans had been induced by fraud. Several of the defendants do not even make such a claim. They were scared, and wanted to get paid before a break came (R. 55, 57, 61, 65). They were willing to accept anticipatory payment at 100% instead of waiting ninety dangerous days for 150%. They presented no charges of fraud to Ponzi when asking payment (R. 54-65). Ponzi, evidently in the hope of keeping the scheme afloat, had offered from the beginning, or from as early as April, to pay his notes forty-five days before maturity at 150% and at any earlier date at 100% (R. 8, 69). When the exposure of his scheme began, in the latter part of July, he reiterated this offer. It was not an offer to accept rescission on account of fraud. It was an offer to pay off in anticipation. He so announced publicly. He instructed his clerks "to pay notes as they were presented, matured or not" (R. 67, 68).

Between July 20th and August 5th about $3,500,000

went into the Hanover Trust Company. A great part of this came from new victims (R. 14).

The payment off of loans continued until, by August 9th, he had overdrawn his account $331,878.07 (R. 94). He did not stop there. He made further payments with some five hundred checks for which there were no funds and which were subsequently proved in bankruptcy (R. 12).

In bankruptcy the proofs of Ponzi's victims were made for 100%, and not for 150% (R. 74).

On these facts the District Court for the District of Massachusetts (R. 6; 280 Fed. 193) and the Circuit Court of Appeals for the First Circuit (R. 102; 284 Fed. 936) decided that the defendants had received no preference, because they got back only what was at the time, August 2d to 4th, 1920, their own money.

The case is here on a writ of certiorari granted by this court on the plaintiff's petition.

The original plaintiffs were James A. Lowell, William R. Sears, and Edward A. Thurston, trustees of the bankrupt estate of Charles Ponzi. Lowell and Sears resigned before the petition for certiorari was filed. Thurston died after the petition was granted. Henry V. Cunningham was appointed in his stead, and now prosecutes these suits.

PREFERENCE SECTIONS OF THE BANKRUPTCY ACT

"Sec. 60 (*a*) A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"(*b*) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable

cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The 1910 amendment of section 60 (*b*) has rendered it no longer necessary to establish the bankrupt's intent to prefer.

Cohen v. *Goldman*, 250 Fed. 599 (C.C.A. 1st).

ARGUMENT

The facts disclose that the defendants received a preference. They received money from the bankrupt within four months of bankruptcy, with reasonable cause to believe that he was insolvent. They gave nothing of value in return. In the opinion of the courts below, the defect in the plaintiff's case is that the defendants received, not payment of Ponzi's obligation, but a return of their own property. This, it is submitted, is error because—

First. The defendants did not get back their own property.

Second. The payments were of Ponzi's money.

Third. The decisions below violate the terms of the Bankruptcy Act and defeat its expressed purpose.

FIRST

THE DEFENDANTS DID NOT GET BACK THEIR OWN PROPERTY

The defendants' act was not a reclamation, and the money received was not the defendants' own.

(1) *The defendants' act was not a reclamation.* The courts below assume that the defendants' act was a rescission for fraud. In reality the defendants did not rescind for fraud. They did not charge to Ponzi that he had committed a fraud, and demand the return of their property on that account. They had no idea that the check which they received was their original money or its proceeds. They had no reason to suppose that it was drawn on a fund into which their money had gone. There is an opportunity for confusion in the fact that the defendants' original property was money. To avoid this, assume that one of the defendants had a thousand-dollar automobile instead of money, with which he bought Ponzi's $1500 note. At the end of July, Ponzi reiterated his announcement and instructed his clerks that he would pay his notes as presented, matured or not (R. 67, 68)—150% if matured, and 100% if not. The automobile seller prefers the smaller, anticipatory 100% payment to the risk of waiting for the 150%. He presents his note. The automobile is at the door. He gets $1000, not the automobile. The $1000, and not the automobile, is what the defendants at bar got. It was not the reclamation of the original property or of its proceeds. It was prepayment of Ponzi's debt. The defendants could not, by their unexpressed thoughts, characterize their acts. Their legal character was determined by the expressed

intent and action. Ponzi's offer was not to surrender property because he had obtained it by fraud. It was to pay his debts before they were due. The defendants' act was the acceptance of that offer. As long as Ponzi continued to pay, he properly described his conduct, not by saying that he had surrendered property which he had obtained by fraud, but by saying that he had paid his notes before maturity at a discount on request. His contracts with the defendants were performed as modified as to time and amount, and not rescinded.

(2) *The money received was not the defendants' own.* The defendants, like Ponzi's other dupes, loaned him money, relying on his future capacity to pay his debts to them. All the funds to Ponzi's deposit account at the Hanover Trust Company had come from these dupes. At the end of July 24th, when the last of the six loans in suit was made, there was on deposit to Ponzi's account at the Hanover Trust Company $871,745.48 (R. 93). If any part of that balance is to be treated as the defendants' money, or its traceable proceeds, then every dollar was the money of some one of the many dupes who had made loans. July 25th was Sunday. During the next three days there is no way of distinguishing between the money which had come from the defendants and the money which had come from the other dupes. The defendants had not then elected to rescind and to give up their 150% notes. In those three days Ponzi withdrew upwards of $1,750,000 (R. 93). Whose money did he withdraw? The courts below say that he did not withdraw any part of the $871,745.48 which had come from the defendants, but that instead he withdrew in

part the upwards of $1,200,000 which he had subsequently deposited on July 26th, 27th, and 28th (R. 93), realized from other dupes. It is respectfully submitted, for the reason later discussed, that this conclusion of the courts below is wholly unfounded.

The District Court bases its decision on the ground that because, some months later, Ponzi's other dupes proved claims in bankruptcy, they thereby waived their equitable rights and affirmed their original loans, and thereby retroactively made the money which Ponzi had received from them in those three days, July 26th to 28th, his own money, and the proving dupes mere lenders; so that none of their money, or its proceeds, remained in Ponzi's hands as their property (R. 14), but that it had, after August 9th, become Ponzi's own on July 26th to 28th. The Circuit Court of Appeals ignores this ground, but says that these same other dupes, by failure to reclaim their money after the disclosures of August 2d and before the filing of the bankruptcy petition on August 9th, thereby affirmed their original loans and became simple creditors, none of whose money, or its proceeds, was in Ponzi's hands as their property (R. 109); but that, at the close of the week beginning with the disclosures of August 2d and ending with the filing of the bankruptcy petition on August 9th, it had thereby all become Ponzi's own on July 26th to 28th.

Both courts seem to disregard the fact that Ponzi's withdrawals from this account on July 26th, 27th, and 28th got their legal character from the facts existing at the time. At that time, either the money in the account was Ponzi's money, or it was his dupes' money. If it was Ponzi's money, then his with-

drawals are chargeable to the deposits in the order of their date and therefore, by the end of July 28th, the entire balance which was in the bank at the end of July 24th, including anything that was traceable to the defendants, had been exhausted. If the deposit was Ponzi's dupes' money, then both courts agree that the withdrawals are chargeable in the same order. The rule is well settled. If none of the money in the fund belongs to the wrongdoer, "such withdrawals must, as among those claimants who are entitled to a charge upon the fund, be charged against the deposits in the order of their respective dates, the doctrine that the first withdrawals will be applied to the first deposits being followed among the claimants though not followed between them and their trustee. And when the amount subject to a charge in favor of a claimant has been diminished to any extent by the application against it of such withdrawals, it is not, nor is it ever, to be increased by any subsequent deposit by the wrongdoer not shown to have been the money of that particular claimant."

Hewitt v. *Hayes*, 205 Mass. 356.
In re A. Bolognesi & Co., 254 Fed. 770 (C.C.A. 2d).
Empire State Surety Co. v. *Carroll County*, 194 Fed. 593, 605 (C.C.A. 8th).
In re Mulligan, 116 Fed. 715 (D.C. Mass.).
Clayton's Case, 1 Mer. 572.

The thing to be determined was to what items Ponzi's withdrawals should be charged on July 26th, 27th, and 28th. That must be determined by the actual intention of Ponzi, or the intention imputed to him by

the law, on those days, and not later. The actual or the imputed intention which he then had, he then had. It depended on the present and past, and not on any future action or inaction of his other dupes, in August and thereafter. There was, in July, no basis whatever for exonerating the proceeds of the defendants' loans by meeting Ponzi's drawings on those days in July exclusively from subsequent loans of his other dupes.

If the balance, which included the defendants' loans, was once exhausted on July 28th, the money which had come from the defendants, and its proceeds, was gone from the fund. It did not return to the fund because other dupes subsequently proved claims in bankruptcy or because they subsequently failed to ask for payment when Ponzi's fraud had become public. If it be assumed that the defendants' loans are to be treated as trust funds before the defendants had rescinded, "the case involves an application of the rule that where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account."

Schuyler v. *Littlefield,* 232 U.S. 707, 710.

The money which the defendants received on August 2d to 4th was money which had first come into the fund after July 28th (R. 13). It was not the defendants' own property, or the proceeds of the defendants' own property.

SECOND

THE PAYMENTS WERE OF PONZI'S MONEY

This is so because (1) in reality this is not a particular-fund case; and (2) even if it is, the money was Ponzi's at the time of payment to the defendants.

(1) *In reality this is not a particular-fund case.* Courts of equity, in the effort to protect *cestuis que trust* from the results of their trustees' embezzlements, have gone far in tracing the trust property and its distinguishable proceeds into conglomerate funds in the trustees' hands, but to do this, there must be a particular fund. It will often be that the general assets of the bankrupt trustee have been increased in a distinguishable amount by a particular misappropriation. But in such a case, if there is no particular fund, tracing is denied. As the *cestui's* property and its proceeds are gone, he must take his chances with ordinary creditors. He has no better right than the ordinary creditor. Such a creditor cannot have a preference, or keep a payment made just before bankruptcy during the known insolvency of the bankrupt.

This is true notwithstanding the fact that the creditor's money made a distinguishable addition to the bankrupt's general assets and was intended to be applied promptly to the purchase of other assets of the same full value, to be turned over to the lender.

> *National City Bank* v. *Hotchkiss,* 231 U.S. 50:
>
> "A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies have gone into it" (231 U.S. 57).

> "What happened as between these parties was simply that all monies received in the course of the day from whatever source went into the firm's [Ponzi's] deposit account with the bank. So that, even if we take it, as a corollary of what was understood, that the use of the clearance loan was expected to enable the firm [Ponzi] to repay the loan, it does not appear to have been expected that the proceeds should be appropriated specifically to that end, but simply that the addition of such proceeds to the general funds of the firm [Ponzi] would enable the latter to pay within the time allowed" (231 U.S. 56).

Look at Ponzi's transactions in perspective: It was the merest accident whether the money of one lender went into one bank or another, or was used to pay agents' commissions in cash without going into any bank, or was used for any other purpose. Making distinction, because of any such accidents, between the rights of the different lenders, all of whom were equally dupes, is artificial, and does not produce a just result. The moneys were not received as trust funds. Neither Ponzi nor the lenders contracted for rights in particular property. Ponzi completed his wrong when he received the money. He did no wrong by putting it into one bank or another or by intermingling all the money received from all the dupes. He did not thereby embezzle. He did not commit any breach of trust. The only reason that there is any chance to talk about a particular fund is because, when the stress came at the end, all Ponzi's moneys were gathered by him into one bank. It is unreal to describe

as a particular fund this account, through which in only twenty days $5,000,000 flowed (R. 13), coming from perhaps fifteen or twenty thousand different small lenders, who had no idea that their moneys were to be put in any fund. In the common and in the legal sense, these bank accounts were Ponzi's general assets.

To make the rights of Ponzi's different dupes depend on tracing and particular-fund theories is straining fictions far away from the realities. It tends to an unfair distribution of insufficient assets among men in the same situation. The occasion for conjuring up fictions does not exist. The realities should prevail. The enormous accounts made up of vast numbers of rapidly moving and confused items were not a particular fund. They were general assets.

(2) *The money was Ponzi's at the time of payment to the defendants.* Ponzi got legal and equitable title to the money which he received from his dupes. In return they got (1) his promissory notes, and (2) a right to rescind and to recall this legal and equitable title because of his fraud. They could not have both the 150% notes and legal or equitable title to the 100% of money at the same time. Until they exercised their election to rescind and offered to return the 150% notes, the money continued to be Ponzi's.

Ponzi had, at all times until affirmative steps to rescind had been taken, a defeasible title to the money; and so far as there was any money left, this defeasible title passed to the trustee in bankruptcy.

Donaldson v. *Farwell*, 93 U.S. 631.

The case of an express trust differs. There the *cestui* has the equitable title from the beginning, without election. If the trustee transfers the property to a purchaser for value without notice, whether rightfully or wrongfully, the *cestui's* equitable title may attach to the proceeds, without election. But, where property or money is obtained by fraud, the vendor or lender has no title, legal or equitable, until he has exercised his option to reclaim the title and has offered to return the consideration.

Accordingly, when Ponzi made the payments to the defendants August 2d to 4th, he gave them money the legal and equitable title to which was then in him. His general estate which was to come to his trustee in bankruptcy was diminished *pro tanto*. It was not the defendants' money, for the reasons hereinbefore stated. Theirs was gone. It was not the money of the other unpaid dupes, because they had not elected to rescind. The District Court said: "All moneys received and paid by such creditor victims must be regarded, for present purposes, as Ponzi's money, i.e., money loaned to him" (R. 14). The Court of Appeals said: "Ponzi had a defeasible title to the money he received from his victims. One who has been induced to part with his goods or money through fraud has an election of remedies; he may rescind the transaction and recover his property, in which case title never becomes absolute in the vendee; or he may affirm the transaction and bring an action for damages, in which case the defeasible title of the vendee becomes absolute" (R. 109).

Indeed, both the courts below, in order to treat

the withdrawals of July 26th, 27th, and 28th as not inclusive of the defendants' money (within the principle of *In re Hallett's Estate*, 13 Ch. Div. 696, and other cases treating withdrawals from a mixed fund as made from the misappropriating trustee's own portion of the fund), held that the moneys received from non-rescinding dupes was Ponzi's money. Evidently what was true of July 26th, 27th, and 28th was also true of August 2d, 3d, and 4th.

If, when the right to rescind for fraud is acted upon, the original property or its proceeds are on hand, the receipt by the rescinding seller from the insolvent buyer, of money instead of the reclaimed property, is not necessarily a preference, because the seller gives 100% present consideration for the money in relinquishing his reclaimable property to the insolvent buyer. Virtually, he gets back his own property and resells it for cash to the insolvent buyer. That cash, received for a present full consideration, is not a preference.

> *Illinois Parlor Frame Co.* v. *Goldman*, 257 Fed. 300 (C.C.A. 7th).

If the property is gone when the opportunity for the rescission is acted upon, the contrary is true.

> *In re Midland Motor Co.*, 224 Fed. 368 (C.C.A. 7th).
> *In re Dorr*, 196 Fed. 292 (C.C.A. 9th).
> *In re Kearney*, 167 Fed. 995 (D.C. Pa.).

If, after trust property has been dissipated by embezzlement by the trustee, he, with the knowledge of his insolvency, takes equivalent property from his

general assets and gives it to the trust to repair the breach, the trust receives a voidable preference.

Clarke v. *Rogers*, 228 U.S. 534.

Even if it be assumed that Ponzi's conduct in depositing and dissipating the defendants' loans in July was a breach of trust, his payment to them in August was none the less a preferential payment from his general assets. The defendants did not give a present 100% consideration for the money received in August. Although they had a right of rescission, the property, with which they would be reinvested by exercising such right, was gone. The only thing which they had left was a claim against Ponzi personally. Whether that claim was the claim of a note-holder, or a claim for damages for deceit, or a claim for money had and received, or a claim for breach of the obligations of a constructive trustee, it was a chose in action only, and not a title, legal or equitable, to any property, whether chattel or money, in Ponzi's possession. Consequently the transactions of August 2d to 4th were the payments by Ponzi of claims *in personam* against Ponzi, and with Ponzi's money.

THIRD

THE DECISIONS BELOW VIOLATE THE TERMS OF THE BANKRUPTCY ACT AND DEFEAT ITS EXPRESSED PURPOSE

At the beginning of August 2d, all Ponzi's dupes who had not then been repaid were a single class. Each held Ponzi's note, and also a right to rescind the original loan for fraud, on offering to return the note, and to sue Ponzi for the money paid him or for damages for deceit. None had then rescinded or waived their right to rescind. The expressed purpose of the Bankruptcy Act is that, when a man is insolvent, all his creditors of the same class, who have reasonable cause to believe this, should share only ratably in his assets, and that the swifter and more forceful creditors should not get a preference.

Creditors are those who are dependent on the capacity of the bankrupt to meet his obligations. Those who have entrusted property to the bankrupt, have relied on his honesty, and not merely on his capacity to meet his obligations. Such men are entitled to their property if it can be found. Their rights are not affected by the Bankruptcy Act. But, if the property is gone, they perforce have become creditors only. They do not, however, fall into a different class merely because their claims arise out of a dissipation of trust property.

Clarke v. *Rogers*, 228 U.S. 534.

If a man has been induced to become an ordinary creditor, as Ponzi's dupes were, by fraud, they may have an election to convert themselves into owners of property in the hands of the bankrupt by rescinding their contract to give credit and recalling their

property. They do not become property owners until they exercise the right to rescind. They do not become property owners then, if their property and its proceeds are gone. They are no better then than the beneficiaries of an express trust. The only thing they have left is the right of a creditor.

With the utmost respect it is submitted that both the courts below have overlooked these distinctions, and have misapplied certain principles not themselves in controversy in this case. The propriety of this assertion is to be tested by reference to the opinions. The District Court says: "They claimed the right to rescind, gave up their notes, and took back the exact sums they paid in" (R. 10). . . . "Even if Ponzi paid them out money derived from those who, by subsequently proving their claims, either on their notes or for the amounts paid in, waived the right to rescind, his estate was not diminished; for the defendants' money, thus freed from the trust ex maleficio, remained in his possession as an exact offset. They relinquished their right to a sum the exact equivalent of the sum they received." . . . "Moreover, if the money with which Ponzi paid these defendants came technically out of a fund made up in whole or in part of money belonging to other cestuis who have not waived the torts, it is far from clear that such moneys ever became Ponzi's estate within the meaning of the Bankruptcy Act." . . . "It is plain, however the legal elements are stated, that Ponzi's 'estate,' if he had any, was neither increased nor diminished by the short-lived fraudulently induced contributions and withdrawals of these defendants" (R. 11). . . . "The defendants were not, when paid, creditors within the

meaning of Section 60 of the Bankruptcy Act; and also that Ponzi's estate was not diminished by these payments" (R. 12). . . . "It is admitted that of the large sums (about $3,500,000) deposited between July 20 and August 5 a great part came from victims who subsequently filed claims in bankruptcy of about $4,000,000, thus electing to treat themselves as creditors ab initio rather than as cestuis qui trustent." . . . "All moneys received and paid by such creditor victims must be regarded, for present purposes, as Ponzi's money, i.e., money loaned to him" (R. 14). . . . "I am unable to find that these defendants had reasonable cause to believe that they were getting a greater percentage of their claims (assuming for the moment that such claimants are creditors) than other claimants 'of the same class' " (R. 16).

(1) In fact, the defendants did not receive "the exact sums they paid in" unless this is used merely to define the amount.

(2) There is no evidence whatever that at the time at which they accepted payment "they CLAIMED the right to rescind." On the contrary, they accepted payment pursuant to Ponzi's offer and direction TO PAY HIS NOTES as they were presented, matured or not (R. 67, 68).

(3) It is true that Ponzi's estate was neither increased nor diminished by the short-lived, fraudulently induced contributions and withdrawals. But this is true of preferences generally. If an ordinary lender is paid no more than he loaned, the estate is not increased or diminished by his contributions and withdrawals. But it is diminished by the withdrawals. The same is true here.

(4) The statement that the defendants were not creditors seems to be in conflict with the decisions of this court.

Schall v. *Camors*, 250 Fed. 6; 251 U.S. 239, 251.
Crawford v. *Burke*, 195 U.S. 176, 187-193.
Tindle v. *Birkett*, 205 U.S. 183.
Friend v. *Talcott*, 228 U.S. 27, 38.
Kreitlein v. *Ferger*, 238 U.S. 21, 27.

(5) One of the most perplexing parts of the decision is that which treats the proofs in bankruptcy after August 9th by the other victims, not on the notes, but for the amount originally obtained by Ponzi, as retroactively making the money which came from such victims, and which was deposited July 26th, 27th, and 28th, Ponzi's own money, although on those same days a distinguishable part of the prior bank balance is said to be, on those same days, the property of the defendants although they had not then rescinded.

The money on July 26th, 27th, and 28th must have been, at that time, either Ponzi's money, because the victims had not rescinded, or the victims' money. In neither event, either by expressed or imputed intent, can it be said that Ponzi, in drawing on July 26th, 27th, and 28th, was making his drafts applicable to new receipts from other victims to the exoneration of the proceeds of old receipts from the defendants; that is, that he intended to use the money of later victims and to hold inviolate the money of earlier victims (*In re Mulligan*, 116 Fed. 715, 722).

At the time that the defendants were paid, August 2d to 4th, the question whether there then remained

in the bank any money of the defendants must be determined by the facts which then existed. Those facts were that none of the unpaid victims had rescinded, and none of them had waived their right to rescind. Their later rescissions or waivers of the right to rescind could not affect the situation of August 2d to 4th.

How would the District Court have dealt with this case if the other dupes, whose loans went into the bank from July 26th to 28th, had not proved at all in bankruptcy? They could not pursue the defendants outside of bankruptcy, because the defendants had received the money in payment of a debt without notice that it was not Ponzi's money. The theory that the money, except that previously secured from the defendants, was all Ponzi's on July 26th to 28th would be exploded because that is based on the view that proof in bankruptcy by these dupes retroactively released their moneys to Ponzi *ab initio*. It would seem that the court would have followed the rule in Clayton's case, which it recognized as sound and applicable, that the withdrawals of July 26th to 28th were to be applied to the earliest deposits. This would have exhausted the balance of July 24th, including the money which came from the defendants. It would have followed that the defendants, when paid, did not get their own money, but, on the contrary, received Ponzi's money, and so a preference. Ponzi's other dupes, exclusive of the non-proving July 26th to 28th ones, would benefit accordingly. This seems the logical result of the District Court's theory. Then comes the bewildering consequence that whether the dupes of June to July 24th and July 29th to August 9th shall

get dividends out of the money received by the defendants depends on whether other dupes, whose money reached the bank July 26th to 28th, do or do not prove in bankruptcy. A theory that produces this result must be wrong.

In fact, Ponzi's dupes never waived their right to rescind. Picture, say, the 729th man in the line that stood on School Street on those hot August days, and who reached Ponzi's doorstep in time to get a check, which he rushed to the Hanover Trust Company to cash, only to find that the deposit was exhausted. His property was gone beyond recall. He enforced his check by proving it in bankruptcy. The 728th man —perhaps the defendant Brown—enforced his check by collecting it at the Hanover Trust Company before the deposit was exhausted. Now, picture the 729th man whiling away his penniless evening by reading 280 Federal Reporter, page 202, there to find that Brown elected to rescind, but that he, 729, elected to treat himself as a creditor *ab initio* rather than as a *cestui que trust*. He asks how he elected, and how he could have acted so as not to elect if he preferred not to elect. His money was gone. There was no fund. The only thing that he had was a claim for the money of which he had been deprived. The only thing which he could do was to prove for that money. There was no election. There was no choice.

The District Court treats the receipt of the check by Brown as significant of a rescission. The receipt of a check by No. 729 was no different. The enforcement of the check is treated as significant of a rescission by Brown. The enforcement of No. 729's check by proof was no different.

But even if 729 had not got as far as the doorway before the giving out of checks ended, it would make no difference. His money was gone. The only thing that he had was a claim. The only way of enforcing it was by proving that claim in bankruptcy. He made no election. He had no choice. He proved only for the original amount obtained from him. He did not prove on the 150% note, which would have been the case had he affirmed the transaction and elected to treat himself as a creditor *ab initio*.

In short, there was, by the proofs in bankruptcy, no affirmation of the original loan contracts; and if there had been this affirmation after August 9th, it would not have affected the question of whose money was drawn out July 26th, 27th, and 28th, or whose money was paid August 2d to 4th.

(6) The court's statement that the defendants, with reasonable cause to believe insolvency, did not have reasonable cause to believe that they were getting a greater percentage of their claims than other claimants of the same class is but a deduction from the court's earlier conclusion as to whose money was left in the bank. It falls with it. The defendants thought that they were getting checks on Ponzi's account at the Hanover Trust Company, and not on the defendants' account. They thought that his assets would be reduced that much, and that there would be that much less in Ponzi's bank account for other lenders. The money, even if it could be traced to its original sources, was all Ponzi's money, to which he had a defeasible title which passed to his trustee in bankruptcy.

Donaldson v. *Farwell*, 93 U.S. 631.

The right to defeat that title belonged only to the victims. If they did not exercise that right, the title of the trustee in bankruptcy was absolute. The funds to which he had that absolute title were diminished to the extent of $5900 by the payments made therefrom August 2d to 4th to these defendants.

It is, of course, immaterial that this question comes before the court in a suit to recover a preference, instead of in the form of a suit by the present defendants against the trustee in bankruptcy to recover a specific $5900. The whole defense amounts to saying that the $5900 which the defendants received August 2d to 4th was their own money. If it was, and if they had not received it before bankruptcy, they would be entitled to receive it in full from the trustee after bankruptcy on the ground that it was not Ponzi's estate, but the defendants' estate, which had come into the hands of the trustee.

Donaldson v. *Farwell,* 93 U.S. 631.

Put in another way—suppose that the bankrupt's petition had been filed before banking hours on August 2d. Then the defendants would be entitled to receive from the trustee in bankruptcy that $5900, because by the assumptions made by the courts below it was their own money, and not a part of Ponzi's estate. But the many thousand other victims would be equally entitled to the upwards of $4,000,000 which was, by the same assumption, their money. There was no such money in hand.

The basic error of the courts below is the erroneous assumption that the $5900 was the defendants' money at the beginning of August 2d, and that they received

their own money. In fact they received Ponzi's money.

The Court of Appeals reaches the same result as the District Court, but on a fundamentally different theory.

(1) The Court of Appeals says: "From anything appearing in the record, all who invested between July 19 and August 4 may have received their money back, as much more was paid out than was received from investors during that period" (R. 110).

This statement is a misapprehension of the record. The District Court had said: "But it is admitted that of the large sums (about $3,500,000) deposited between July 20 and August 5 a great part came from victims who subsequently filed claims in bankruptcy of about $4,000,000" (R. 14). It is on this admitted fact that the District Court's "fiction" rests. The moneys paid out up to August were principally in the ordinary course of Ponzi's business. His offer and instruction was to pay his notes as presented, matured or unmatured. The heavy payments in the latter part of July were doubtless largely on matured notes. The men who loaned Ponzi a great part of about $3,500,000 between July 20th and August 5th did not receive payment before August 1st, but, on the contrary, proved in bankruptcy. By July he was receiving loans at the rate of about $1,000,000 a week (R. 8). There is no evidence that there was any general attempt by holders of unmatured notes to be paid until after the District Attorney's action on July 26th.

(2) The Court of Appeals says: "Ponzi had a defeasible title to the money he received from his victims" (R. 109). But the court makes no use of this un-

doubted and applicable principle. It means that, when Ponzi was making the withdrawals of July 26th, 27th, and 28th, he was drawing from funds to which he had title, and therefore his withdrawals are to be applied to his deposits in the order of their date, and not exclusively to deposits made after July 25th.

(3) The Court of Appeals says: "Ponzi's victims may be divided into two classes: those who became convinced that he was an imposter engaged in a fraudulent scheme and who rescinded their transactions and received back what they paid in; and those who for the sake of a large profit risked their money with him until it was too late to get it back. The defendants are typical of the first class. The creditors represented by the trustees include the second class. The second class having played the game and lost, the trustees are now seeking contribution in their behalf and that of other creditors, from the less daring but more fortunate first class" (R. 109). In applying this statement, consider the, say, 1143d man in that waiting line on School Street. His elbows were not strong enough to get him to Ponzi's doorstep before the moneys and the checks were gone. He seeks to discover why he has lost, by reading 284 Federal Reporter, page 943, only to find that the 728th man—possibly Brown—was less daring in running his chance, but that he, No. 1143, was one who, for the sake of a large profit, risked until it was too late, and, having played the game and lost, was to be deferred to the man farther ahead in the line. Look at the realities! All Ponzi's victims were deluded by the idea that Ponzi would pay them $1.50 for $1. Whether they are pitied or blamed for their credulity, they are all alike in this.

When the exposure came, they were scared, and hastened to get paid. There is not the slightest suggestion in the record that any of the unfortunates who have proved claims in bankruptcy failed to get their money merely because they decided after the exposure that they would still continue to run the risk. Yet the court says: "Those who could get their money back and didn't knowing as they must from the time the MacMaster's expose was published August 2, that Ponzi was an imposter, affirmed their investments and are not entitled to rescind. Their money became a part of the bankrupt's general estate" (R. 109). There were no such people. There is nothing in the record to suggest that there were any such. The court fixes the date August 2d. By August 3d the deposit account had gone down to $20,165.67. It rose again, but before the end of the week had gone down again to $13,391.32, and on August 9th—one week from the publication of the exposure—there was an overdraft of $331,878.07. During that week throngs of victims in long lines were pressing—sometimes riotously—to get paid (R. 75, 76). Under these circumstances it must have astonished No. 1143 to find that in some way the Circuit Court of Appeals thought that any of these victims had "affirmed" their investments.

The courts below assume that the moneys on deposit were the moneys of the victims, but that, by affirming the loans later those moneys became, at a time *before* the affirmance, the moneys of Ponzi, but never the moneys of Ponzi's trustee in bankruptcy. How can this be? The loans were loans, without any subsequent affirmance, and until disaffirmance. The defeasible title which Ponzi had, passed to his trustee

in bankruptcy, and that title covered not only the money left in the bank, but money of the same kind which had been withdrawn from the bank and preferentially received by particular victims with knowledge of Ponzi's insolvency.

The victims who did not disaffirm and defeat that title did not surrender their rights to other victims. They merely failed to disaffirm, and that left the original defeasible title of the trustee in bankruptcy an abolute title.

As the right to rescind for fraud, if the property remains, is not cut off by the occurrence of bankruptcy, but continues against the trustee in bankruptcy (93 U.S. 631), it follows that the defendants, if now entitled to keep this money, would have been entitled to take it all, from the trustee if it had come to his hands, even without rescission before bankruptcy. But all other dupes had a like right, and there was not enough money. In *Empire State Surety Co.* v. *Carroll County*, 194 Fed. 593 (C.C.A. 8th), two defrauded depositors in an insolvent bank sought to get specifically the remnant of the particular fund into which their deposits had gone. The fund was insufficient to pay all defrauded depositors. The other defrauded depositors had proved as common creditors in receivership proceedings. It was urged that this action freed the fund from their claims and left the fund as traceable proceeds of the deposits of these two depositors. But the court said (p. 607):

> "[12] It is true, as suggested by counsel, that the individual depositors who put these deposits into the bank after June 11, 1908, have not claimed preference in payment out of the proceeds of

their funds. But they are represented here by the receiver, who objects on their behalf that they are cestuis que trustent equally with the county, and that, while they are content in view of the fact that four-fifths of the claims against the bank are by claimants of this class to share the proceeds of its insolvent estate equally with all claimants, they protest against the taking of a share of their dividends to pay other cestuis que trustent of only equal rank in full. These sureties are appealing for their preferences to a court of equity which may and ought to require those who seek equity to do equity. And when, as in this case, the entire record shows that the allowance of a claim for a preferential payment out of the proceeds of an insolvent estate will be inequitable and unjust to the great majority in number and in amount of the creditors of the estate whose claims are equal in law and in merit to that pressed for preference, while the denial of this preference will violate no rule of law or of equity and work no injustice, but will tend to preserve that equality which is equity, the claim presents no equity and makes no appeal to the conscience of the chancellor for its allowance, and it must be denied."

Ponzi had title to all the money he received, from the time he received it, and, at the very best for the defendants, that title as to each dollar was good against all the world except for the right of each particular victim to reclaim his particular dollar or its proceeds. That victim's right of rescission did not

belong to any other victim. The defendant victims should get no benefit from it.

These adverse comments on the decisions below are not those of defeated parties alone. The Dean of the Yale Law School has criticized these decisions in a scholarly article in the Yale Law Journal for January, 1923, page 267, reprinted in full as an appendix to the brief in support of the petition for certiorari in this case. Judge Morton also reached a different conclusion without discussing the question of rescission in *Lowell* v. *Ashton*, 272 Fed. 536, an earlier preference case arising out of payments made by Ponzi under the same circumstances. The answer of one of the defendants raised the question as in the case at bar.

To reduce the details, while keeping the same essential facts, imagine a case: Ponzi, by false representations, induces the defendant Furst to discount his note, and thereby secures $5000, which he deposits in the Hanover Trust Company. Next, by the same false representations, he persuades one Seccond to discount another note, and thereby he obtains $5000 more, which he adds to this deposit, making the balance $10,000. He then withdraws $5000, with which he pays up some of his debts. Furst and Seccond, each ignorant of the other's dealings with Ponzi, learn that Ponzi is a fraud and insolvent and was so when he obtained the loan. Ponzi says he will pay his notes before maturity at the amount originally loaned. Furst demands and receives payment of $5000 from Ponzi in a check on the Hanover Trust Company, which he cashes, and thereby exhausts the account. A petition in bankruptcy is filed against Ponzi. Ponzi's trustee in bankruptcy sues Furst to recover the $5000

which he received as a preference. By the rule in Clayton's case, recognized by the courts below as correct, the first $5000 which Ponzi drew exhausted the money which had come from Furst and had been first deposited. Before Ponzi paid the second $5000 to Furst, Seccond could have reclaimed it, because it was obtained from him by fraud and could be identified as remaining in the deposit account. This right was cut off by the payment of the second $5000 to Furst who took it as a purchaser for value without notice of Seccond's right to reclaim it. Furst did not receive it as Seccond's money. He received it as Ponzi's. As the fund was exhausted before bankruptcy, Seccond has no fund from which to reclaim his money. Furst had no fund from which to reclaim his, because his part of the fund had been exhausted by Ponzi's first draft. When Furst got the second $5000, he had nothing but a claim. He got that paid in full with knowledge of Ponzi's insolvency. Ponzi's trustee is entitled to get back the payment for the benefit of Ponzi's general creditors. Seccond realizing that Furst is a bona-fide purchaser for value of the $5000, and that there is no money left in the account, proves his claim in bankruptcy for the $5000 without interest, and not on the note. The trustee's right to recover the preference cannot be defeated by the fact that Seccond has become one of the general creditors. The courts below say that Seccond and the other general creditors can have nothing, and that Furst can have it all. If Furst had not been paid, and Seccond had not reclaimed the money, the general creditors, including Furst and Seccond, would each have received, in dividends, a portion of the $5000. The preferential payment has deprived the general

creditors, including Seccond, of this dividend. It is the simple case of a voidable preference.

The theory of the courts below produces another impossible result: All the victims who were paid an amount equal to their original loan, after the exposures about the end of July, would be in the same position as the defendants. Each one of them sued by the trustee would defend as the defendants did below, on the ground that what they received was their own money or its proceeds. But each of these possible defendants does this by showing that the payments to the others from the fund were of Ponzi's money *ab initio*. As the whole deposit was exhausted by these payments, it results that EACH PART of this fund is a rescinding VICTIM'S MONEY, but THE SUM OF ALL THE PARTS is PONZI'S MONEY, and yet his trustee in bankruptcy can recover none of it, although it was all paid out to persons who knew that Ponzi was insolvent.

CONCLUSION

Looking at the realities: on August 1, 1920, Ponzi owed several million dollars which he had obtained by fraud from several thousand creditors. They were all of a kind. He was insolvent. They knew it. The Bankruptcy Act contemplates that they shall not get the better of each other by speed and strength. They ought all to share ratably in the insufficient assets. If the defendants and the thousands who were paid after August 1st keep the money, they get paid as much as they loaned, while the other four thousand, similarly situated, get a very small percentage. If the preferential millions are paid back, they will get a much larger percentage, and all will get the ratable treatment as of the end of July which the Bankruptcy Act contemplates shall be accorded all in like situation.

To let the lucky ones, who got there first, keep all at the expense of the no less worthy unlucky ones violates the equality which courts of equity and the Bankruptcy Act both seek to further.

Respectfully submitted,
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CLARENCE M. GORDON,
For the Petitioner.

January, 1924.

Supreme Court of the United States.

October Term, 1928.

No. 214.

HENRY V. CUNNINGHAM, SUCCESSOR TO EDWARD A. THURSTON, TRUSTEE OF THE BANKRUPT ESTATE OF CHARLES PONZI,

PETITIONER,

vs.

BENJAMIN BROWN ET ALS.,

DEFENDANTS.

Defendants' Brief.

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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 213.

HENRY V. CUNNINGHAM, SUCCESSOR TO EDWARD A. THURSTON, TRUSTEE OF THE BANKRUPT ESTATE OF CHARLES PONZI, *Petitioner*,

v.

BENJAMIN BROWN ET ALS., *Defendants.*

DEFENDANTS' BRIEF.

STATEMENT OF THE CASE.

This case is before this court to review the decision of the Circuit Court of Appeals for the First Circuit affirming a decree entered by the United States District Court for the District of Massachusetts dismissing the bill in six cases brought by the trustees of Charles Ponzi to set aside as preferences certain payments made to the defendants.

The defendants' answers in substance set up the allegations that the designated sums of money were obtained by fraud, and as a result of such fraud these several defendants rescinded their contracts, thereby withdrawing their own moneys.

The defendant Brown further alleged that he was an infant at the time of the transaction and was still an infant at the time of the suit, and that $600 of the $1200 claimed by the trustees belonged to another infant, named Gross. This bill in equity was defended by a guardian *ad litem*.

STATEMENT OF FACTS.

In December, 1919, Ponzi began in a small way sell ing 50 per cent ninety-day notes, representing in substance that he had discovered that, through the use of international reply postal coupons, he was able to make within a short period of time 100 per cent or more profit, and that he was generously sharing his profits with the public, who would furnish him money to manipulate in the foreign exchange. His scheme was a pure fraud and a swindle; his method of paying a large percentage was in making payments to earlier comers profits out of the contributions of the later ones. Acting upon such representations and rumors, these defendants deposited their moneys with Ponzi or his agents. At no time did Ponzi deal substantially in international coupons or any other speculations in foreign exchange.

The money invested with Ponzi by defendant Brown as it appears from the record is $600 on July 20, 1920, and $600 on July 24, 1920. The return check is dated August 2, 1920.

Defendant Brown, by Saturday, July 31st, became uneasy about his investment with Ponzi and decided to demand his money back, but when he appeared on that day at the office of said Ponzi at 27 School Street, he found the office closed, and so returned home to Revere, taking his notes with him, fully determined to demand the money paid by him on the following business day, August 2d, Monday. On August 2d he left his home at Revere at 8 o'clock in the morning with this fixed determination. He did not remember seeing the "Post" on that morning. His purpose was in no way the result of the article in the "Boston Post." On that day a check was given to him at the

office of Ponzi, which he cashed at the Hanover Trust Company.

It was further admitted by the plaintiffs that, of the $1200 thus received, $600 belonged to one Gross, who was also an infant and to whom defendant Brown gave $600 upon cashing the check. Gross deposited the $600 July 20th or 24th in Brown's name, without Brown's knowledge. Gross made the investment in Brown's name, fearing that his family would object if it learned of his investment, and for the same reason left the note with Brown for safekeeping. Brown knew nothing of the investment by Gross until later, when Gross gave him (Brown) his note to hold. Brown withdrew the money for both on his own initiative, returning $600 to Gross.

Ponzi stopped receiving money on July 26, 1920, and on August 9, 1920, an involuntary petition in bankruptcy was filed against him, and on October 25th of the same year he was adjudicated bankrupt. During the last few weeks of Ponzi's career he took in about a million dollars a week. He received from all the investors about $9,300,000. Claims to the amount of approximately $3,440,000 have been proved and allowed in the Ponzi proceedings by holders of these notes. These investors were allowed to prove, by the ruling of the referee, for the amounts only which they paid Ponzi, and not for the face value of their notes. Up to July 22d Ponzi had accounts at the Hanover Trust Company and at the Tremont Trust Company, but after that date he deposited all his receipts at the Hanover Trust Company. The defendant received a check of Ponzi drawn on the Hanover Trust Company; the amount of the check was the amount of the consideration paid on the notes. Three notes of $80,000 each, made by three different persons, were

discounted by Ponzi at the Hanover Trust Company, and the proceeds were credited to Ponzi's account on August 3, 1920, thereby increasing his balance to $240,000. Until August 3, 1920, the moneys he deposited in the Hanover Trust Company in Ponzi's several accounts were made up entirely of moneys deposited there directly in the Hanover Trust Company or first deposited in the outside banks and later transferred to the Hanover Trust Company.

The total amount of money in Ponzi's account at the Hanover Trust Company during the period covered by these transactions was five million two hundred sixteen thousand eight hundred thirty-eight dollars and thirty-five cents ($5,216,838.35), made up as follows:

Account in bank, morning July 19th	$334,726.69
Received from victims	3,726,660.96
Transferred from other banks or accounts	1,165,450.70
Total	$5,216,838.35
Withdrawals during period	4,833,165.15
Balance at close of business August 4th	
	$383,673.20

On July 22, 1920, Ponzi was requested by the president and treasurer of the Hanover Trust Company to take a certificate of deposit for some of his money then on deposit in that bank, telling him that the Fourth Atlantic National Bank, which did the clearing for the Hanover Trust Company, would not be able to clear his checks, if he should draw checks for the full amount of his balance. To protect the Fourth Atlantic National Bank he took a certificate of deposit

for one million five hundred thousand dollars ($1,500,000). This $1,500,000 certificate of deposit was made up in the following manner: He signed six checks for $200,000, dated July 17, 1920, which were certified on that date by the Hanover Trust Company, and another check for $300,000, dated July 22, 1920; these checks were stamped on the back: "Hanover Trust Company, July 22, 1920, Pay Teller."

The plaintiffs stated in court that the above-mentioned certificate of deposit for $1,500,000 was split up into three certificates of $500,000 each, and one of these $500,000 certificates was used in payment of the three $80,000 notes and applied on an overdraft of some $200,000.

In this decision the District Court, among others, made the following findings of fact:

> "They claimed the right to rescind, gave up their notes, and took back the exact sums they paid in, so that their dealings with Ponzi neither increased nor diminished the amount of assets,—which remained for distribution exactly the same as if they had no dealings at all with him.
>
> "The defendants' moneys were deposited, not later than one day after their payment to Ponzi, in the Hanover Trust Company, with other moneys extracted from other victims by similar fraud.
>
> "The defendants' moneys went, on or almost immediately after the dates of payments, into an identified deposit in the Hanover Trust Company, and there remained until it was repaid to them by checks drawn as above set forth. In other words, so far as the defendants' rights are concerned, the trust fund in the Hanover Trust Company remained unaffected by the large deposits

and withdrawals between July 20th and August 5th.

"In addition to the moneys remaining in this consolidated account in the Hanover Trust Company, Ponzi had actually there on deposit $1,500,000 more, represented by time certificates of deposit taken out for the purpose of preventing embarrassment to the bank through which the Hanover Trust Company checks were cleared. While these certificates were negotiable, they were not in fact negotiated. They were grounded on moneys received prior to the earliest date here significant —July 20.

"If material, it is a fact that Ponzi had in this Hanover Trust Company during the period in question a deposit ranging from $2,500,000 down to a little over $1,500,000.

"The defendants had no reasonable cause to believe that the moneys received by them by payment of the checks drawn on the Hanover Trust Company did not come from the specific funds into which their moneys had gone."

Argument.

I.

Synopsis of Law Points on Main Issue.

To clarify the issues, let us test the contentions of the plaintiffs by the syllogistic standard.

The major premise is embodied in the Act of 1898 as amended, section 60, *a* and *b*.

To establish a conclusive minor premise the plaintiffs must prove, as of August 2, 1920:

1. Ponzi's insolvency.
2. A transfer to the defendant Brown.

3. A transfer within four months of bankruptcy.

4. A transfer of the bankrupt's property.

5. That the defendant Brown was a creditor, and that the effect of the enforcement of the transfer would enable the defendant Brown to obtain a greater proportion of his debt that any other creditor of the same class.

6. That the defendant Brown had reasonable grounds to believe the enforcement of said transfer would effect a preference.

If a single one of the foregoing elements fails, the plaintiffs are out of court, for this chain is no stronger than its weakest link. 1, 2, and 3 may be conceded without comment, but the facts as to the remaining elements are widely variant from a minor premise establishing a conclusion that a preference, by any interpretation of the term, has been established.

Let us remember that we are not dealing with a question of common law, controlled by no precedents, and which offers no recourse but widely divergent theses based on analogy, but with the hard and fast terminology of a statute; and that a proposition to fall within its purview must be predicated on the inexorable rule of statutory construction that its terms must be met by terms of identical import.

A notable illustration may be found in the recent case of *Poudreka* v. *Turner Falls Co.*, 241 Mass. 100, in which, on the finding that the death of the plaintiff's intestate was due to a wilful and malicious injury inflicted by the defendant, the court held that the fault of the defendant differed in kind and not in degree from the term "negligence" as prescribed by the death statute, General Laws, chapter 229, section 5, and that there could be recovery, observing that the

undoubted hardship could only be relieved by the legislature.

Elements 4, 5, and 6 either collectively or individually furnish a perfect analogy to the Pondreka case. The trustees do not and cannot satisfy the terms of the statute therein embodied. The burden of proof is distinctly upon them—

> Black on Bankruptcy (3d ed.), secs. 614 and 573;
> Collier on Bankruptcy (12th ed.), 868—

and their inability to sustain this burden epitomizes the failure of the propositions upon which they base their case.

They must show under 4, *supra*, by a preponderance of proof, that the money transferred to defendant Brown on August 2, 1920, was the property of Ponzi, and that there thereby was consummated a depletion of the funds available for general creditors. The record discloses that Brown, on Saturday, July 31st, becoming anxious for the safety of his financial venture, went to Ponzi's office for the purpose of rescinding his contracts and withdrawing the money paid in by him. Finding the office closed, on August 2, 1920, he received a check from Ponzi at his office, which he cashed on the same date at the Hanover Trust Company. It further appears that Ponzi's deposit exceeded the withdrawals of Brown's and the other defendants, his balance on August 2d being $121,436.21 and on August 4th $313,737.08. It also appears that the money paid to Ponzi by Brown was deposited by him not later than the day succeeding payment in the Hanover Trust Company, and although there were deposits and withdrawals by the bankrupt during the intervening time, the presumption is, where money

charged with a trust *ex maleficio* is mingled with the general funds of the debtor, that the debtor first exhausts his own before paying out trust funds.

Hewitt v. *Hayes*, 205 Mass. 356.
In re Hallett's Estate, 13 Ch. Div. 143.
Empire State Surety Co. v. *Carroll County*, 194 Fed. 593.
Importers' & Traders' Nat. Bk. v. *Peters*, 123 N.Y. 272.
Southern Cotton Oil Co. v. *Elliotte*, 218 Fed. 567.
Smith v. *Motley*, 150 Fed. 266.
Peters v. *Bain*, 133 U.S. 670.

In a word, the plaintiffs have failed to establish the element "property of the bankrupt." The defendant having exercised his right to rescind, the money was his own property, and he could maintain his title against all persons except one receiving it for value *bona fide* without notice.

Atwood v. *Dearborn*, 1 Allen, 483, 484.
National Bank v. *Insurance Co.*, 104 U.S. 54.
Bussing v. *Rice*, 2 Cush. 48.
Tiffany v. *Boatman's Institute*, 18 Wall. 375, 390.
Goodwin v. *Massachusetts Loan Co.*, 152 Mass. 189, 199, and cases cited.
Peoples National Bank v. *Mulholland*, 228 Mass. 152, 158.
Watchmaker v. *Barnes*, 259 Fed. 783.

In plain language the plaintiffs have nothing further than "a transfer of property of another than the bankrupt." Therefore element 4 fails and, *pari*

passu, element 5 suffers the same fate. Brown, having received back his own property, is not a creditor, and consequently the transfer did not operate to diminish the bankrupt's estate.

In *Hewitt* v. *Hayes, supra,* the court segregated in a distinct class parties who had chosen to prove their claims against the bankrupt estate as distinguished from those who had rescinded; the two remedies being utterly inconsistent and the latter being barred by the election. Not being a creditor at all, he has obtained nothing that belongs to creditors of the same class.

In the same line of reasoning, the suit of the plaintiff also lacks the ground of liability that the person receiving the transfer had reasonable ground for believing that preference had been made.

The rescinding party has merely exercised the right of reclamation. He stands in the shoes of an owner recovering his own as truly as does the plaintiff in replevin. Consequently he is chargeable with no knowledge as to his relative rights as against persons who, as against him, have no rights at all.

The misapplied authority and subjective criticism which make up the bulk of the plaintiff's argument fall far short of the preponderance of convincing proof which the plaintiffs must adduce before they can hope to establish element 6. Granted that the defendant Brown had reasonable cause to believe that Ponzi was insolvent, and that he, Brown, had obtained a greater proportion than those who proved their claims in bankruptcy, this does not show reasonable cause to believe that a preference has been made.

The plaintiffs cannot win under the statute, and a careful analysis of their argument shows a palpable effort to divert attention from the main issue, by attacks upon the decisions of the District Court and

Circuit Court of Appeals, which are so irrelevant that, while professing to effect a *reductio ad absurdum*, they have actually and literally begged the question, as will be shown under another head in this brief.

II.

The Far-Reaching Effect of the Decisions of the District Court and the Circuit Court of Appeals.

A careful examination of the opinion in each case shows that the settled law of Massachusetts has been followed. This case, as dealing with a preference, is not a bankruptcy case proper.

> Loveland on Bankruptcy (4th ed.), sec. 541.
> *Pond* v. *New York Exchange Bank*, 124 Fed. 992.

Section 60-*b* of the Bankruptcy Act, in connection with the recovery of a voidable preference provides: "And for the purpose of such recovery any State Court which would have had jurisdiction, shall have concurrent jurisdiction." This not being a strictly federal question, the District Court and the Circuit Court of Appeals will give effect to the common law of Massachusetts, the state in which the alleged preference was made, citing state and federal authorities in other jurisdictions (for corroborative purposes) in precisely the same way as a state court which, while lending chief weight to its own decisions, refers to decisions in other states. This fundamental principle is ignored by the appellants, who in effect ask this honorable court to overrule the decision of the Circuit Court of Appeals in the First Circuit by *Empire State Surety Co.* v. *Carroll County*, 194 Fed. 593. In other words, it is argued that the established law of Massachusetts be overruled in a federal court in the Dis-

trict of Massachusetts and following the common law of Massachusetts, by decision of a federal court sitting in the District of Iowa and following the law of Iowa in an Iowa case.

> "Turning now to the main issues: It is important, to keep clearly in mind that these are suits to recover voidable preferences and nothing else. On no other ground has this Court jurisdiction. (See Section 60-b of the Bankruptcy Act.) They are technical preference suits, and might have been brought in a state court and tried before a jury. The issues here are precisely the same as they would have been in the state court on the law side. In order to recover, the plaintiffs must fully prove their cases under Section 60 of the Bankruptcy Act. The issues here presented are quite other than those before the court in the Bolignesi cases, 254 Fed. 770, or in the Matthews case, 238 Fed. 785. See also In re Stewart, 178 Fed. 463."

The appellants stress the decisive character of *Clayton's Case*, 1 Mer. 572. On this point the Circuit Court of Appeals held as follows:

> "The plaintiffs call attention to the rule in Clayton's case, 1 Mer. 572, claiming it governs these cases. By this rule withdrawals from a fund belonging in equity to several persons, and insufficient to satisfy their claims in full, are charged against deposits to the fund in the order of the receipts of these deposits. Claimants share in the fund in the inverse order in which their moneys went into it.
>
> "The true application of the rule in Clayton's case is pointed out in re Hallett's Estate, 13 Ch.

Div. 143. It is there held that, if a person who holds money as a trustee or in a fiduciary character, pays it to his account at the bankers, and mixes it with his own money and afterwards draws out sums by checks in the ordinary manner that the rule in Clayton's case, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.

"But if the fund into which trust moneys have been paid is insufficient in amount to satisfy all beneficiaries, then it is held (Frye, J.) that as between two cestuis que trust whose money the trustee has paid into his own account at his banker's, the rule in Clayton's case applies so that the first sum paid in will be held to have been the first drawn out.

"It does not appear that the money in the Hanover Trust Company was ever depleted to a sum insufficient to pay all of Ponzi's victims who sought rescission from that fund. The rule of Clayton's case is not applicable."

In *Hewitt* v. *Hayes*, 205 Mass. 356, 361, the court lays down the rule as to the presumption that withdrawals from a mixed fund were made from the trustee's own part of the fund, and not from the part consisting of the trust money, so long as there remains in the fund available for use any part of the trustee's own money, citing, among others, *National Bank* v. *Insurance Co.*, 104 U.S. 54, and *In re Hallett's Estate*, 13 Ch. Div. 143, adding:

"The rule in Clayton's case that checks are to be applied against deposits in the order of their

respective dates has been modified to this extent, as is shown by the cases above cited . . . but it is said that our own recent decisions are at variance with this doctrine. We do not so consider. Little v. Chadwick, 151 Mass. 109, turned on the fact that the trust fund there in question could neither be identified nor traced into any specific fund; and the court said that it was not enough that it had gone into the general estate of the defaulting trustee. But it was expressly stated in the opinion and indeed was manifest that there was nothing in that opinion contrary to National Bank v. Insurance Co., or In re Hallett's Estate, 13 Ch. Div. 143. The same thing is true of Lowe v. Jones, 192 Mass. 94. It was really sought in that case to establish a trust in the general assets of an insolvent estate upon the ground that the proceeds of trust property wrongfully disposed of had gone into those general assets, and thus increased the amount of the estate. There is some authority for this statement, (See cases in 19 Harv. Law Rev. 519), but this court never adopted it, and we are not now disposed to do so. In O'Brien v. N. E. Trust Co., 183 Mass. 186 no one but the executrix of the deceased sheriff made any claim to the deposit. And see further Le Breton v. Pierce, 2 Allen 8; Andrews v. Bank of Cape Ann, 3 Allen 313; White vs. Chapin, 134 Mass. 230; Howard v. Fay, 138 Mass. 104; Attorney General v. Brigham, 142 Mass. 248."

It is respectfully submitted *Empire State Surety Co. v. Carroll County, supra,* is in the last analysis not at variance with the doctrine herein maintained. It holds:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver."

It is enough to point out that the excerpt from *Hewitt* v. *Hayes, supra*, reconciles its decision with every one of the Massachusetts cases cited. Moreover, the Eighth Circuit decision reaffirmes the doctrine as to the identification of a trust fund, when mingled with the funds of a trustee, in the following significant words:

"Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling (Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C.C.A. 553, 555, 15 L. R. A. (N.S.) 1100; Weiss v. Haight & Freese Co. (C.C.) 152 Fed. 479; American Can Co. v. Williams, 178 Fed. 420, 423, 101 C.C.A. 634, 637), as trust property, because the legal presumption is that he regarded the law

> and neither paid out nor invested in other property the trust fund, but kept it sacred (Board of Com'rs v. Patterson (C.C.) 149 Fed. 229, 232; Spokane County v. First National Bank, 68 Fed. 979, 16 C.C.A. 81)."

Judge Morris in the case at bar cites this very passage in support of the decision in the Circuit Court of Appeals, and although *Empire State Surety Co.* does not cite *In re Hallett's Estate*, the above excerpt reaffirms its modification of *Clayton's Case* in the most emphatic terms.

In their brief before the Circuit Court of Appeals (p. 22) the appellants cited *In re Mulligan*, 116 Fed. 715, 722.

In re Mulligan, relied upon by the appellants, presents a case of the conflicting claims of two cestui, and is consequently beside the opinion so far as the case at bar is concerned. In fact, the court recognizes the doctrine for which the appellants contend, in the following excerpt:

> "It may be reasonable that a trustee should be deemed to draw his checks against that part of a mingled account which is his own."

In their petition for certiorari to the Circuit Court of Appeals for the First Circuit the appellants rely on these two cases and *Clayton's Case*, 1 Mer. 572, ignoring its modification by *In re Hallett's Estate*, 13 Ch. Div. 143.

IN EFFECT THEY CLAIM THAT THE FORMER IS STILL IN FORCE UNMODIFIED, WHILE THEY ATTEMPT TO SUPPORT THEIR CONTENTION BY IN RE MULLIGAN, WHICH, IN THE VERY EXCERPT ON WHICH THEY RELY, THEY EXHIBIT TWO CONFLICTING EQUITIES, THE CONDITION PRECEDENT FOR THE

MODIFIED TERMS IN WHICH ALONE THIS CASE MAY BE INVOKED. Bearing in mind that in the case at bar there is no such conflict, we respectfully submit that the plaintiffs by their own authorities have established the law upon which the defendants' case rests, for the Eighth Circuit decision, in the last excerpt quoted, in affect reaffirms *In re Hallett's Estate*, as is true of the sentence quoted *supra* from *In re Mulligan* (decision in the District Court of Massachusetts, it may be observed).

It merely remains to point out that the Supreme Court of the United States has set its seal of approval upon the doctrine for which the appellee contends, in *National Bank* v. *Insurance Co.*, 104 U.S. 54.

III.

The Main Issue Becomes a Moot Question as to the Infant Defendant, Brown.

The right of an infant to disaffirm all obligation sounding in contract is absolutely beyond dispute, with the single exception relating to necessaries.

McGreol v. *Taylor*, 167 U.S. 688.
Knudson v. *General Motorcycle &c.*, 230 Mass. 54.

It were an act of supererogation to discuss under the Massachusetts common law the question of the voidability in cases where a different terminology is employed, for a preference suit is an action of contract *eo nomine*.

Jacobs v. *Saperstein*, 225 Mass. 300.
Rogers v. *American Halibut Co.*, 216 Mass. 227.

Hewitt v. *Boston Straw Board Co.*, 214 Mass. 260.

Were it necessary to invoke the law of other jurisdictions, it is enough to say that it has been held to be an implied contract under the statutory provision enabling the trustee to proceed.

Cohen v. *Small*, 120 N.Y. App. Div. 211.
Reber v. *Ellis Bros.*, 185 Fed. 313.

The refusal of the court to sanction the adjudication of an infant by involuntary proceedings (Black on Bankruptcy, 3d ed., sec. 102) justifies by perfect analogy the conclusion that no denial of the infant's immunity held sacred by common law will receive judicial cognizance. To repeat, a preference suit is not a bankruptcy proceeding. The statute merely lays down the terms on which the right of action is predicated, leaving the rest to the substantive law of the forum. The appellants assert in their brief before the Circuit Court of Appeals (p. 87) (citing Black, Bankruptcy, 2 ed., sec. 573) that the right of the trustee to recover back a preference, which is freely admitted, is a liability imposed entirely by statute, citing—

Christopher v. *Norvell*, 201 U.S. 216.

The case is beside the point, merely holding that the individual liability of a married woman as stockholder arose, not out of contract (void by state law on account of coverture), but was absolutely fixed by the National Banking Law, whereby she became liable with other stockholders by no contract with any one. It was a federal question pure and simple, and this decision has no bearing on the case at bar, in which the common law of contract is supreme.

By demanding and receiving his money back, the defendant was only exercising his right of rescission as a minor, under the age of twenty-one; and therefore no transfer was affected.

It is obvious that the dealings between Ponzi and the defendant Brown amounted to a contract, and a contract not for necessaries.

A contract of this nature the defendant had a legal right to cancel at any time during his minority, and a reasonable time thereafter.

Brown avoided the contract by withdrawing his money, thus leaving all the parties concerned in the same status as if there had been no transaction at all. This is based on the theory that the contracts of minors are voidable until avoided.

The trustees cannot hold the defendant Brown for the $600 deposited by the infant Gross.

It was admitted at the trial that $600 deposited by Gross belonged to him, and that Brown, upon cashing the check for $1200, returned half to Gross.

It seems to the appellees that, to sustain a suit on the note against Brown on his (Brown's) note, the trustees must prove the note they rely upon belongs to defendant Brown. On this point the evidence is entirely against the plaintiffs, for Brown testified that "he did not know whether he invested his own note of $600 on the twentieth or the twenty-fourth day of July."

Respectfully submitted,

LOUIS GOLDBERG,

Attorney for Defendants.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1923.

CUNNINGHAM, TRUSTEE OF PONZI, *v.* BROWN ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 213. Argued March 12, 1924.—Decided April 28, 1924.

1. Where a person obtained money by fraudulent representations from many others upon his time notes for the amounts borrowed and fifty per cent., but, to stimulate public confidence, gave it out that he would return the amount borrowed on any note at any time before its maturity and pursued that practice, *held*, that lenders who took advantage of this offer and secured repayment shortly before his bankruptcy, when they had reason to believe him insolvent, were not thereby rescinding their contracts for the fraud and reclaiming their own funds, but were creditors equally with the others who filed their claims for reimbursement in the bankruptcy proceedings; and that the repayments thus made were illegal preferences recoverable by the bankrupt's trustees. P. 10.
2. Facts *held* to sustain a finding that parties obtaining repayments had reason to believe the payor insolvent. *Id.*
3. Where the funds of a bankrupt consisted entirely of money borrowed from many persons by fraud, a lender who rescinded and secured repayment out of the same bank account in which his and other like loans were deposited by the bankrupt, could not justify the repayment, against the charge of illegal preference, upon the theory of a resulting trust, or lien, if the repayment was made after the account had been exhausted by payments to other lenders and after it had been replenished by the bankrupt with other portions of the borrowed funds. P. 11.

4. In such a situation, the ruling in *Clayton's Case*, 1 Merivale, 572, that defrauded claimants were entitled to be paid inversely to the order in which their moneys went into a common fund, has no application; and likewise the ruling in *Knatchbull* v. *Hallett*, L. R. 13 Ch. D. 696, that where a fund is composed partly of a defrauded claimant's money and partly of that of the wrongdoer, it will be presumed that, in the fluctuations of the fund, it was the wrongdoer's purpose to draw out first the money to which he was honestly entitled, and that the claimant may assert an equitable lien on the residue. P. 12.
5. A minor is not exempt from defeat of an unlawful preference under § 60b of the Bankruptcy Act. P. 13.

284 Fed. 936, reversed.

CERTIORARI to review decrees of the Circuit Court of Appeals affirming decrees of the District Court which dismissed the bills in six suits, brought by the trustees of a bankrupt, under § 60b of the Bankruptcy Act, to recover payments made by the bankrupt, upon the ground that they were unlawful preferences.

Mr. Edward F. McClennen, with whom *Mr. William R. Sears* and *Mr. Clarence M. Gordon* were on the brief, for petitioner.

Mr. John H. Devine, with whom *Mr. Walter A. Buie*, *Mr. Edward A. Counihan, Jr.*, and *Mr. Joseph P. Dexter* were on the brief, for Crockford, Murphy and Holbrook, respondents.

The fraud in these cases consisted in Ponzi's receiving the respondent's money when he was hopelessly insolvent, he knowing the fact and concealing his condition from the respondents, innocent depositors. *In re Stewart*, 178 Fed. 463, and cases there cited.

When the respondents' money was thus obtained, it was impressed with a trust for their benefit which attached to the general fund with which Ponzi's moneys were mingled, and this trust followed that fund so long as the trust moneys were not exhausted. *In re Stewart*,

supra; Cheney v. *Dickinson,* 172 Fed. 109; *Friend* v. *Talcott,* 228 U. S. 27; *St. Louis & San Francisco Ry. Co.* v. *Johnston,* 133 U. S. 566; *In re Hamilton Carpet Co.,* 117 Fed. 774; *In re Gold,* 210 Fed. 410.

The respondents would have the right to have their money back even if Ponzi had not deposited the identical money he received from them but had substituted other moneys belonging to himself. *National Bank* v. *Insurance Co.,* 104 U. S. 54.

In these cases, however, it is clear and undisputed that the very moneys of which Ponzi defrauded the respondents were deposited by him in the Hanover Trust Company and that the checks they received and cashed were drawn upon his account in that bank.

The right of the respondents to recover their property cannot be impaired by the trustee. *Bussing* v. *Rice,* 2 Cush. 48; *Cf. Tiffany* v. *Boatman's Institution,* 18 Wall. 375; *Goodwin* v. *Massachusetts Loan Co.,* 152 Mass. 189. See also *Peoples National Bank* v. *Mulholland,* 228 Mass. 152; *Watchmaker* v. *Barnes,* 259 Fed. 783.

Respondents were not creditors. *Richardson* v. *Shaw,* 209 U. S. 365; *Donaldson* v. *Farwell,* 93 U. S. 631.

Ponzi stood to them in a relation of a trustee *ex maleficio.* Pomeroy's Eq. Juris., 2d ed., § 1053.

The respondents never submitted themselves to the jurisdiction of the bankruptcy court, and the money which they received was not impressed with any lien or trust in favor of the trustees in bankruptcy.

If the respondents were never creditors of Ponzi's estate in bankruptcy, but merely *cestuis que trustent,* their taking back their moneys out of Ponzi's hands in no manner diminished his estate.

Indeed, it seems from all the evidence that until the election of some of Ponzi's customers to prove their claims in bankruptcy, there was no property in the estate upon which the bankruptcy court could lay hold. Until then,

all the property Ponzi had consisted of trust money. Certainly the bankrupt's estate was not diminished by the payments to the respondents.

There can be no preference without a depletion of the bankrupt's estate. *In re Schwab,* 258 Fed. 772. See *Gorman* v. *Littlefield,* 229 U. S. 19; Bankruptcy Act, as amended June 25, 1910, § 60 (a) and (b); *Putnam* v. *United Trust Co.,* 223 Mass. 199; *Rogers* v. *American Halibut Co.,* 216 Mass. 227.

The only evidence on which the petitioner can rely to establish that the respondents had reasonable cause to believe a preference would be effected, is the newspaper report. That the respondents, or any of them, saw that report is purely conjectural. *Rogers* v. *American Halibut Co., supra.*

The following cases, although decided before the amendment of 1910 to the Bankruptcy Act, seem to be in point upon the question as to what constitutes reasonable cause to believe that the debtor was insolvent and that a preference would be effected by payment to the creditors. *Grant* v. *National Bank,* 97 U. S. 80; *In re First National Bank of Louisville,* 155 Fed. 100; *Curtiss* v. *Kingman,* 159 Fed. 880; *Tumlin* v. *Bryan,* 165 Fed. 166.

The burden was on the trustees. *Importers & Traders National Bank* v. *Peters,* 123 N. Y. 272; *National Bank* v. *Insurance Co.,* 104 U. S. 54; *Southern Cotton Oil Co.* v. *Elliotte,* 218 Fed. 567; *In re Mulligan,* 116 Fed. 715; *Ellicott* v. *Kuhl,* 16 N. J. Eq. 333; *Hewitt* v. *Hayes,* 205 Mass. 356; *Smith* v. *Mottley,* 150 Fed. 266; *Ryder* v. *Hathaway,* 21 Pick. 298; *Tumlin* v. *Bryan,* 165 Fed. 166; *In re Leech,* 171 Fed. 622; *Turner* v. *Schaeffer,* 249 Fed. 654.

Mr. Louis Goldberg for Brown, respondent.

The trustees must show by a preponderance of proof, that the money transferred was the property of Ponzi,

and that there thereby was consummated a depletion of the funds available for general creditors. The presumption is, where money charged with a trust *ex maleficio* is mingled with the general funds of the debtor, that the debtor first exhausts his own before paying out trust funds.

The defendant having exercised his right to rescind, the money was his own property, and he could maintain his title against all persons except one receiving it for value *bona fide* without notice. *Atwood* v. *Dearborn,* 1 Allen, 483; *National Bank v. Insurance Co.,* 104 U. S. 54; *Bussing* v. *Rice,* 2 Cush. 48; *Tiffany* v. *Boatman's Institution,* 18 Wall. 375; *Goodwin* v. *Massachusetts Loan Co.,* 152 Mass. 189; *Peoples National Bank* v. *Mulholland,* 228 Mass. 152; *Watchmaker* v. *Barnes,* 259 Fed. 783.

Having received back his own property, Brown is not a creditor, and consequently the transfer did not operate to diminish the bankrupt's estate. *Hewitt* v. *Hayes,* 205 Mass. 356.

The suit of the plaintiff lacks the ground of liability that the person receiving the transfer had reasonable ground for believing that preference had been made.

The rescinding party has merely exercised the right of reclamation. Consequently he is chargeable with no knowledge as to his relative rights as against persons who, as against him, have no rights at all.

Granted that the defendant Brown had reasonable cause to believe that Ponzi was insolvent, and that he, Brown, had obtained a greater proportion than those who proved their claims in bankruptcy, this does not show reasonable cause to believe that a preference has been made.

This case, as dealing with a preference, is not a bankruptcy case proper. Loveland, Bankruptcy, 4th ed., § 541; *Pond* v. *New York Exchange Bank,* 124 Fed. 992; Bankruptcy Act, § 60b.

This not being a strictly federal question, the District Court and the Circuit Court of Appeals will give effect to the common law of Massachusetts, the State in which the alleged preference was made. This fundamental principle is ignored by the petitioners, who in effect ask this Court to overrule the decision of the Circuit Court of Appeals for the First Circuit in *Empire State Surety Co.* v. *Carrol County*, 194 Fed. 593.

Clayton's Case, 1 Merivale, 572, is inapplicable. *Hewitt* v. *Hayes*, 205 Mass. 356; *Empire State Surety Co.* v. *Carrol County, supra. In re Mulligan*, 116 Fed. 715, distinguished. See *Knatchbull* v. *Hallett*, 13 Ch. Div. 696; *National Bank* v. *Insurance Co.*, 104 U. S. 54.

The main issue becomes a moot question as to the infant defendant, Brown. *MacGreal* v. *Taylor*, 167 U. S. 688; *Knudson* v. *General Motorcycle Co.*, 230 Mass. 54; *Jacobs* v. *Saperstein*, 225 Mass. 300; *Rogers* v. *American Halibut Co.*, 216 Mass. 227; *Hewitt* v. *Boston Straw Board Co.*, 214 Mass. 260; *Cohen* v. *Small*, 120 App. Div. 211; *Reber* v. *Ellis Bros.*, 185 Fed. 313.

To repeat, a preference suit is not a bankruptcy proceeding. The statute merely lays down the terms on which the right of action is predicated, leaving the rest to the substantive law of the forum. *Christopher* v. *Norvell*, 201 U. S. 216, distinguished.

By demanding and receiving his money back, Brown was only exercising his right of rescission as a minor, under the age of twenty-one; and therefore no transfer was effected.

It is obvious that the dealings between Ponzi and Brown amounted to a contract, and a contract not for necessaries.

A contract of this nature the defendant had a legal right to cancel at any time during his minority, and a reasonable time thereafter.

Brown avoided the contract by withdrawing his money, thus leaving all the parties concerned in the same status

as if there had been no transaction at all. This is based on the theory that the contracts of minors are voidable until avoided.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These were six suits in equity brought by the trustees in bankruptcy of Charles Ponzi to recover of the defendants sums paid them by the bankrupt within four months prior to the filing of the petition in bankruptcy, on the ground that they were unlawful perferences. All the trustees have died or resigned pending the litigation, and Cunningham, having been substituted for the last survivor, is now the sole trustee. The actions were tried together in the District Court, and were argued together in the Circuit Court of Appeals, and all the bills were dismissed in both courts. The facts and defenses are the same in all the cases, except that, in that of Benjamin Brown, there was an additional defense that he was a minor when the transactions occurred. We have brought the cases into this Court by writ of certiorari.

The litigation grows out of the remarkable criminal financial career of Charles Ponzi. In December, 1919, with a capital of $150, he began the business of borrowing money on his promissory notes. He did not profess to receive money for investment for account of the lender. He borrowed the money on his credit only. He spread the false tale that on his own account he was engaged in buying international postal coupons in foreign countries and selling them in other countries at 100 per cent. profit, and that this was made possible by the excessive differences in the rates of exchange following the war. He was willing, he said, to give others the opportunity to share with him this profit. By a written promise in ninety days to pay them $150 for every $100 loaned, he induced thousands to lend him. He stimulated their avidity by

paying his ninety-day notes in full at the end of forty-five days, and by circulating the notice that he would pay any unmatured note presented in less than forty-five days at 100% of the loan. Within eight months he took in $9,582,000 for which he issued his notes for $14,374,000. He paid his agents a commission of 10 per cent. With the 50 per cent. promised to lenders, every loan paid in full with the profit would cost him 60 per cent. He was always insolvent and became daily more so, the more his business succeeded. He made no investments of any kind, so that all the money he had at any time was solely the result of loans by his dupes.

The defendants made payments to Ponzi as follows:

Benjamin Brown, July 20th	$600
Benjamin Brown, July 24th	600
H. W. Crockford, July 24th	1,000
Patrick W. Horan, July 24th	1,600
Frank W. Murphy, July 22nd	600
Thomas Powers, July 24th	500
H. P. Holbrook, July 22nd	1,000

By July 1st, Ponzi was taking in about one million dollars a week. Because of an investigation by public authority, Ponzi ceased selling notes on July 26th, but offered and continued to pay all unmatured notes for the amount originally paid in, and all matured notes which had run forty-five days, in full. The report of the investigation caused a run on Ponzi's Boston office by investors seeking payment and this developed into a wild scramble when, on August 2nd, a Boston newspaper, most widely circulated, declared Ponzi to be hopelessly insolvent, with a full description of the situation written by one of his recent employees. To meet this emergency, Ponzi concentrated all his available money from other banks in Boston and New England in the Hanover Trust Company, a banking concern in Boston, which had been his chief depository. There was no evidence of any gen-

eral attempt by holders of unmatured notes to secure payment prior to the run which set in after the investigation July 26th.

The money of the defendants was paid by them between July 20th and July 24th and was deposited in the Hanover Trust Company. At the opening of business July 19th, the balance of Ponzi's deposit accounts at the Hanover Trust Company was $334,000. At the close of business July 24th it was $871,000. This sum was exhausted by withdrawals of July 26th of $572,000, of July 27th of $288,000, and of July 28th of $905,000, or a total of more than $1,765,000. In spite of this, the account continued to show a credit balance because new deposits from other banks were made by Ponzi. It was finally ended by an overdraft on August 9th of $331,000. The petition in bankruptcy was then filed. The total withdrawals from July 19th to August 10th were $6,692,000. The claims which have been filed against the bankrupt estate are for the money lent and not for the 150 per cent. promised.

Both courts held that the defendants had rescinded their contracts of loan for fraud and that they were entitled to a return of their money, that other dupes of Ponzi who filed claims in bankruptcy must be held not to have rescinded, but to have remained creditors, so that what the latter had paid in was the property of Ponzi, that the presumption was that a wrongdoing trustee first withdrew his own money from a fund mingled with that of his *cestui que trustent*, and therefore that the respective deposits of the defendants were still in the bank and available for return to them in rescission, and that payments to them of these amounts were not preferences but merely the return of their own money.

We do not agree with the courts below. The outstanding facts are not really in dispute. It is only in the interpretation of those facts that our difference of view arises.

In the first place, we do not agree that the action of the defendants constituted a rescission for fraud and a restoration of the money lent on that ground. As early as April, his secretary testifies, Ponzi adopted the practice of permitting any who did not wish to leave his money for forty-five days to receive it back in full without interest, and this was announced from time to time. Two of the defendants expressly testified to this. It was reiterated in the public press in July and by the investigating public authorities. There is no evidence that these defendants were consciously rescinding a contract for fraud. Certainly Ponzi was not returning their money on any admission of fraud. The lenders merely took advantage of his agreement to pay his unmatured notes at par of the actual loan. Such notes were paid under his agreement exactly as his notes which were matured were paid at par and 50 per cent. The real transaction between him and those who were seeking him is shown by the fact that there were five hundred to whom he gave checks in compliance with his promise and who were defeated merely because there were no more funds.

The District Court found that when these defendants were paid on and after August 2nd, they had reason to believe that Ponzi was insolvent. The statute, § 60b of the Bankruptcy Act, as amended June 25, 1910, c. 412, 36 Stat. 838, 842, requires that, in order that a preference should be avoided, its beneficiary must have reasonable cause to believe that the payment to him will effect a preference, that is that the effect of the payment will be to enable him to obtain a greater percentage of his debt than others of the creditors of the insolvent of the same class. The requirement is fully satisfied by the evidence in this case, no matter where the burden of proof. On the morning of August 2nd, when news of Ponzi's insolvency was broadly announced, there was a scramble and

a race. The neighborhood of the Hanover Bank was crowded with people trying to get their money and for eight days they struggled. Why? Because they feared that they would be left only with claims against the insolvent debtor. In other words, they were seeking a preference by their diligence. Thus they came into the teeth of the Bankrupt Act and their preferences in payment are avoided by it.

But even if we assume that the payment of these unmatured notes was not according to the contract with Ponzi and that what the defendants here did was a rescission for fraud, we do not find them in any better case. They had one of two remedies to make them whole. They could have followed the money wherever they could trace it and have asserted possession of it on the ground that there was a resulting trust in their favor, or they could have established a lien for what was due them in any particular fund of which he had made it a part. These things they could do without violating any statutory rule against preference in bankruptcy, because they then would have been endeavoring to get their own money, and not money in the estate of the bankrupt. But to succeed they must trace the money and therein they have failed. It is clear that all the money deposited by these defendants was withdrawn from deposit some days before they applied for and received payment of their unmatured notes. It is true that by the payment into the account of money coming from other banks and directly from other dupes the bank account as such was prevented from being exhausted; but it is impossible to trace into the Hanover deposit of Ponzi after August 1st, from which defendants' checks were paid, the money which they paid him into that account before July 26th. There was, therefore, no money coming from them upon which a constructive trust, or an equitable lien could be fastened. *Schuyler* v. *Littlefield,* 232 U. S. 707; *In re*

Mulligan, 116 Fed. 715; *In re Matthews' Sons*, 238 Fed. 785; *In re Stenning* (1895), 2 Ch. 433. In such a case, the defrauded lender becomes merely a creditor to the extent of his loss and a payment to him by the bankrupt within the prescribed period of four months is a preference. *Clarke* v. *Rogers*, 228 U. S. 534; *In re Dorr*, 196 Fed. 292; *In re Kearney*, 167 Fed. 995.

Lord Chancellor Eldon, in *Clayton's Case* (1816 Ch.), 1 Merivale, 572, held that, in a fund in which were mingled the moneys of several defrauded claimants insufficient to satisfy them all, the first withdrawals were to be charged against the first deposits and the claimants were entitled to be paid in the inverse order in which their moneys went into the account. Ponzi's withdrawals from his account with the Hanover Trust Company on July 26, 27 and 28, were made before defendants had indicated any purpose to rescind. Ponzi then had a defeasible title to the money he had received from them and could legally withdraw it. By the end of July 28th, he had done so and had exhausted all that was traceable to their deposits. The rule in *Clayton's Case* has no application.

The courts below relied on the rule established by the English Court of Appeals in *Knatchbull* v. *Hallett*, L. R. 13 Ch. D. 696, in which it was decided by Sir George Jessel, Master of the Rolls, and one of his colleagues, that where a fund was composed partly of a defrauded claimant's money and partly of that of the wrongdoer, it would be presumed that in the fluctuations of the fund it was the wrongdoer's purpose to draw out the money he could legally and honestly use rather than that of the claimant, and that the claimant might identify what remained as his *res* and assert his right to it by way of an equitable lien on the whole fund, or a proper *pro rata* share of it. *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68; *Hewitt* v. *Hayes*, 205 Mass. 356. To make the rule applicable here, we must infer that in the deposit and withdrawal

of more than three millions of dollars between the deposits of the defendants prior to July 28th, and the payment of their checks after August 2nd, Ponzi kept the money of defendants on deposit intact and paid out only his subsequent deposits. Considering the fact that all this money was the result of fraud upon all his dupes, it would be running the fiction of *Knatchbull* v. *Hallett* into the ground to apply it here. The rule is useful to work out equity between a wrongdoer and a victim; but when the fund with which the wrongdoer is dealing is wholly made up of the fruits of the frauds perpetrated against a myriad of victims, the case is different. To say that, as between equally innocent victims, the wrongdoer, having defeasible title to the whole fund, must be presumed to have distinguished in advance between the money of those who were about to rescind and those who were not, would be carrying the fiction to a fantastic conclusion.

After August 2nd, the victims of Ponzi were not to be divided into two classes, those who rescinded for fraud and those who were relying on his contract to pay them. They were all of one class, actuated by the same purpose to save themselves from the effect of Ponzi's insolvency. Whether they sought to rescind, or sought to get their money as by the terms of the contract, they were, in their inability to identify their payments, creditors and nothing more. It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit but its letter and secured an unlawful preference.

We do not see that a minor whose money could not be identified is in a better situation than that of the other defendants. Like them, on August 2nd, he was only a creditor of Ponzi, and was moved to avoid insolvency by a preference just as they were. A minor is not exempt

from the defeat of an unlawful preference by § 60b of the Bankruptcy Act as amended.

The decrees are reversed.